(26,239)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 772.

UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OKLAHOMA ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this the 10th day of November, A. D. 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR., *Deputy.*

1 Filed in Supreme Court of Oklahoma Oct. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6033.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

v.

THE STATE OF OKLAHOMA and R. L. WILLIAMS, Governor of the State of Oklahoma; J. L. Lyon, Secretary of the State of Oklahoma; E. B. Howard, Auditor of the State of Oklahoma; R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, and Frank Gault, President of the Board of Agriculture of the State of Oklahoma, Composing the Commissioners of the Land Office of the State of Oklahoma, on the Relation of J. H. Chambers, Their Attorney, Defendants in Error.

Citation.

To the Above Named Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, District of Columbia, thirty days from and after this 24th day of October, 1917, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Oklahoma, wherein you are defendants in error and United States Fidelity and Guaranty Company, a corporation is plaintiff in error to show cause, if any there be, why the judgment rendered against the said plaintiff

in error as in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable J. F. Sharp, Chief Justice of the Supreme Court of Oklahoma, this 27th day of October, 1917.

J. F. SHARP,
Chief Justice.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court.

We hereby acknowledge due service of the within citation this 24th day of October, 1917.

S. P. FREELING,
Attorney General, State of Oklahoma.
LEDBETTER, STUART & BELL.

2 Filed in Supreme Court of Oklahoma Oct. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6033.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

v.

THE STATE OF OKLAHOMA et al., Defendants in Error.

Petition for Writ of Error.

The United States Fidelity & Guaranty Company, plaintiff in error in the above entitled cause feeling aggrieved by the decision and judgment of the court rendered thereon on the 9th day of October, 1917, come now by Ames, Chambers, Lowe & Richardson, its attorneys of record herein, and petitions the court for an order allowing said plaintiff in error to prosecute a writ of error to the Honorable Supreme Court of the United States under and according to the rules of the United States in that behalf made and provided, and for an order that all further proceedings herein be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

C. B. AMES,
Attorneys for Plaintiff in Error.

3 Filed in Supreme Court of Oklahoma Oct. 27, 1917.
William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. —.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

v.

THE STATE OF OKLAHOMA and R. L. WILLIAMS, Governor of the State of Oklahoma; J. L. Lyon, Secretary of State of the State of Oklahoma; E. B. Howard, Auditor of the State of Oklahoma; R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, and Frank Gault, President of the Board of Agriculture of the State of Oklahoma, Composing the Commissioners of the Land Office of the State of Oklahoma, on the Relation of J. H. Chambers, Their Attorney, Defendants in Error.

Assignment of Errors.

Comes now the United States Fidelity and Guaranty Company, a corporation, the above named plaintiff in error, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit:

I.

The Supreme Court of the State of Oklahoma committed error in affirming the judgment of the District Court of Oklahoma County, Oklahoma, in said cause.

II.

The Supreme Court of the State of Oklahoma erred in holding that Section 323 of the Compiled Laws of 1909 (Session Laws 1907 and 1908, Chapter 6, Article 2 Section 6, page 141) as construed by it does not conflict with the Fourteenth Amendment of the Constitution of the United States by depriving plaintiff in error of its property without due process of law, and denying to it the equal protection of the laws and in refusing to hold that said section is in conflict with Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of
4 contracts.

III.

The Supreme Court of Oklahoma erred in holding that the Act of the Legislature creating the depositor's Guaranty Fund, being Article 2 of Chapter 6 of the Session Laws of 1907 and 1908 as

construed by it was not in conflict with the Fourteenth Amendment of the Constitution and with Section 10 of Article 1 of the Constitution of the United States by the taking of the property of the Columbia Bank and Trust Company, and this plaintiff in error and of the defendants in error without due process of law, and impairing the obligation of the contract between this plaintiff in error and the said Columbia Bank and Trust Company.

IV.

The Supreme Court of Oklahoma erred in holding that Section 9 of Chapter 22 of the Session Laws of 1913 (Pages 31 and 32) does not conflict with Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of the contract between the plaintiff in error and the defendants in error and the Columbia Bank and Trust Company.

V.

The Supreme Court of the State of Oklahoma erred in holding that Sections 232 and 7943 of the Compiled Laws of 1909 construed in connection with Section 9 of Chapter 22 of the Session Laws of 1913 do not violate the Fourteenth Amendment of the Constitution of the United States and Section 10 of Article 1 by taking the property of the plaintiff in error without due process of law, and by denying to them the equal protection of the law and by impairing the obligation of the contract between the plaintiff in error and the defendants in error and the Columbia Bank and Trust Company.

5 VI.

The Supreme Court of Oklahoma erred in holding that the plaintiff in error and the defendants in error upon the failure of the Columbia Bank and Trust Company were not entitled to participate in the assets of the said Columbia Bank and Trust Company.

Wherefore the said plaintiff in error prays that the judgment of the Supreme Court of the State of Oklahoma be reversed.

C. B. AMES,
Attorneys for Plaintiff in Error.

6-8 Filed in Supreme Court of Oklahoma Oct. 27 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6033.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA et al., Defendants in Error.

Order Allowing Writ of Error.

This cause coming on to be heard on the 27th day of October, 1917, upon petition of the plaintiff in error for a writ of error herein, and it appearing that the said plaintiff in error has filed its assignment of errors, it is hereby ordered upon motion of C. B. Ames, one of the attorneys for plaintiff in error that a writ of error be and it is hereby allowed to have reviewed in the Supreme Court of the United States, the judgment heretofore rendered in said cause on the 9th day of October, 1917.

And it further appearing that said plaintiff in error has prayed for an order of supersedeas in said cause, it is further ordered that said plaintiff in error be required to execute its bond in said cause in the sum of $500.00 and that upon the filing of said bond, and its approval by the Chief Justice of this court, it is ordered that all further proceedings be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Ordered, Adjudged and Decreed, this 27th day of October, 1917.

J. F. SHARP,
Chief Justice.

Attest:

[SEAL.] WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

* * * * * * *

9 Filed in Supreme Court of Oklahoma Oct. 30, 1917. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

State of Oklahoma, before you or some of you, by the highest court of law or equity of the said state in which a decision could be had in the said suit between United States Fidelity and Guaranty Company, plaintiff in error, and the State of Oklahoma, and R. L. Williams, Governor of the State of Oklahoma; J. L. Lyon, Secretary of the State of Oklahoma, E. B. Howard, Auditor of the State of Oklahoma, R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, and Frank Gault, President of the Board of Agriculture of the State of Oklahoma, composing the Commissioners of the Land Office of the State of Oklahoma on the relation of J. H. Chambers, their attorney, defendants in error, wherein was drawn in question the validity of a statute of the State of Oklahoma which the plaintiff in error claimed was in conflict with the Fourteenth Amendment to the Constitution of the United States and the decision was in favor of the validity of said statute, a manifest error has happened to the great damage of United States Fidelity and Guaranty Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at Washington on the 26 day of November 1917, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the Supreme Court
10-14 may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 27 day of October, 1917.

[SEAL.] ARNOLD C. DOLDE,
Clerk of the District Court.

Allowed by

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

* * * * * * *

15 STATE OF OKLAHOMA,
County of Oklahoma, ss:

In the Superior Court of Oklahoma County, Oklahoma.

THE STATE OF OKLAHOMA and CHARLES N. HASKELL, Governor of the State of Oklahoma; Bill Cross, Secretary of State of the State of Oklahoma; M. E. Trapp, Auditor of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma, and J. P. Connors, President of the Board of Agriculture of the State of Oklahoma, Composing the Commissioners of the Land Office of the State of Oklahoma on the Relation of J. H. Chambers, Their Attorney, Plaintiffs,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant.

Petition.

The plaintiffs for their cause of action against the defendant, state,

First. That Charles N. Haskell, Governor of the State of Oklahoma, Bill Cross, Secretary of State of the State of Oklahoma, M. E. Trapp, Auditor of the State of Oklahoma, E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma, and J. P. Connors, President of the Board of Agriculture of the State of Oklahoma, compose the Commissioners of the Land Office of the State of Oklahoma, and that under the Constitution and laws of the State of Oklahoma, said Commissioners of the Land Office have the charge, care, management, custody and control of the permanent common school and other education funds belonging to the State of Oklahoma, and have the authority to designate banks as depositories for such funds.

16 Second. That the defendant, the United States Fidelity & Guaranty Company is a foreign corporation, chartered and existing under and by virtue of the laws of the State of Maryland, and at the dates and times hereinafter mentioned it had complied with the laws of this State, authorizing and licensing foreign corporations to do business in the State of Oklahoma, and had designated the Commissioner of Insurance of the State of Oklahoma, as its agent to receive service of process in all actions that might be brought against it in the State of Oklahoma, and had nominated and appointed the said Commissioner of Insurance as its agent and Attorney in Fact, and that the said United States Fidelity & Guaranty Company had likewise nominated and appointed T. M. Upshaw, a resident of Oklahoma City, in the State of Oklahoma, as its agent and Attorney in Fact on whom service of process could be legally made in this action and all other actions brought against said company in the State of Oklahoma.

Third. That on the 18th day of May, 1909, the said defendant, The United States Fidelity & Guaranty Company, as surety for and

jointly with the Columbia Bank & Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, executed a depository bond unto the State of Oklahoma, as obligee in the sum of $50,000.00, by which the said United States Fidelity & Guaranty Company as surety for said Columbia Bank & Trust Company became bound and liable to pay into the State of Oklahoma the said sum of $50,000.00, according to the tenor and effect of said bond; a copy of which, except the signature, is hereto attached, referred to, marked Exhibit "A" and made a part of this petition.

Fourth. The plaintiffs allege that under and by virtue of the authority conferred by law on said Commissioners of the Land Office they had prior to the execution of said depository bond,
17 designated the Columbia Bank & Trust Company, a corporation, as a depository of the funds in the custody and control of said Commissioners, and contemporaneously with the execution of said bond by the said United States Fidelity & Guaranty Company, and the acceptance thereof by said Commissioners of the land office, said commissioners deposited in the Columbia Bank & Trust Company, a sum of money largely in excess of said sum of $50,000.00, and in said bond the said United States Fidelity & Guaranty Company bound and obligated itself that if the said principal, the Columbia Bank & Trust Company should during the term beginning at nine o'clock A. M., on the 18th day of May, A. D., 1909, and ending with the close of the Banking hours on the 17th day of May, A. D., 1910, well and faithfully perform the trust imposed in it by the designation of said Bank as a depository of said fund, and should promptly pay all funds and moneys so deposited with said bank by said Commissioners of the Land Office, either on legal order or on the check or draft of the said Commissioners of the land Office or the Secretary of the Commissioners of the Land Office, and should well and truly indemnify the said State of Oklahoma, the obligee in said bond from any and all losses which it might suffer or sustain during said term, by reason of the designation of said Columbia Bank & Trust Company, as such depository, then and in that event, said bond should become void, otherwise, it should remain in full force, virtue and effect.

Fourth. The plaintiffs further allege that on the 29th day of September, 1909, during the regular banking hours of said day the Commissioners of the Land Office of the State of Oklahoma presented to said bank and a duly authorized and elected officer of said bank, a certain check for said sum of $50,000.00 dated at Guthrie, Oklahoma, September 29th, 1909, and payable to the order of Ed O.
Cassidy, Secretary to the Commissioners of the Land Office of
18 the State of Oklahoma, and signed by said Ed O. Cassidy, Secretary of said Commissioners of the Land Office and countersigned by Ray O. Weems, Accountant, which said check was drawn and issued against the deposit in said Columbia Bank & Trust Company, to cover the said sum of $50,000.00 which had been previously deposited in said Bank and that payment of said check was thereupon refused by said Bank and by its officers, agents and

employees; that proper demand in all respects in conformity to the requirement of said bond was then and there duly and legally made upon said Bank for said sum of $50,000.00, secured and guaranteed as aforesaid by said bond of the defendant herein, and payment thereof was refused; that following the said demand for the payment of said money, written demand was by the Commissioner of the Land Office made upon A. M. Young, State Bank Commissioner, who had taken charge and possession of the business affairs and assets of said Bank for the payment of said sum of $50,000.00, secured as aforesaid by said bond, but that he likewise refused to pay said sum of money to said Commissioners of the Land Office; a copy of which said demands are hereto annexed, marked Exhibit "B" and made a part hereof; that afterwards, to-wit: on the 30th day of September, 1909, the defendant herein, The United States Fidelity & Guaranty Company, of Baltimore, Maryland, was duly and legally notified of the failure of said Columbia Bank & Trust Company, to pay said deposit, and demand was thereupon duly and legally made upon the defendant herein for the payment of said sum of $50,000.00, which said sum the defendant failed and refused to pay, a copy of the notice to and demand upon the defendant herein is hereto annexed, marked Exhibit "C" and made a part hereof.

19 Fifth. The plaintiffs allege that at the dates and times herein mentioned, said Columbia Bank & Trust Company was engaged in business in Oklahoma City, Oklahoma County, in the State of Oklahoma, and that its failure, and the failure of the defendant herein to comply with the terms and provisions of said bond and its default with respect thereto, occurred in said city, County and State, and the demand upon said Bank for the payment of said deposit was made therein, and that by reason of all the facts herein alleged the plaintiffs' cause of action against the said defendant, The United States Fidelity & Guaranty Company, arose and accrued in said City, County and State, and that by reason of said facts the said United States Fidelity & Guaranty Company has failed to keep, and has broken and violated the obligations assumed by it according to the terms and conditions of said bond, and that it has become liable and bound to pay the plaintiffs herein in Oklahoma City, County and State, the said sum of Fifty Thousand Dollars, with lawful interest thereon from and after the said 29th day of September, 1909.

Wherefore, the plaintiffs pray that defendant be summoned as the law directs, and that they have judgment for the amount of said bond, together with interest at the legal rate from said September 29th, 1909, and all other relief to which they may be entitled.

J. H. CHAMBERS,
Attorneys for Plaintiffs.

LEDBETTER, STUART & BELL,
Of Counsel for Plaintiffs.

EXHIBIT "A."

Depository Bond.

Know all men by these presents, That we, The Columbia Bank & Trust Company, a corporation, located at Oklahoma City, in the State of Oklahoma, (hereinafter called the principal), as Principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation duly incorporated under the laws of the State of Maryland (hereinafter called the Surety), as Surety, are held and firmly bound unto the State of Oklahoma, (hereafter call- the Obligee), in the full sum of Fifty Thousand Dollars, to which payment, well and truly to be made, the said bodies corporate bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated this 18th day of May, A. D. 1909.

The condition of the foregoing obligation is such, That whereas the said Obligee has designated the said Principal as a depository for the funds and moneys that shall come into the possession of the Commissioners of the Land Office of the State of Oklahoma, by virtue of the performance of the official duties of the said Commissioners of the Land Office, as provided by the laws of Oklahoma and Acts of Congress.

Now therefore, the condition of the above obligation is such that if the said principal shall, during the term beginning at 9 o'clock A. M. on the 18th day of May, A. D. 1909, and ending with the close of banking hours on the 17th day of May, A. D. 1910, well and faithfully perform the trust reposed in it by such designation, and shall promptly pay all funds and moneys so deposited with it, either on legal order or on the check or draft of the Commissioners of the Land Office of the State of Oklahoma, and shall well and truly indemnify the said Obligee from any and all losses which it may suffer or sustain during the period as aforesaid, by reason of the designation of said principal as such depository, aforesaid,
21 then this obligation to be void, otherwise to remain in force and virtue.

Provided, However, and this bond is issued by the Surety on the following express conditions:

First. That in the event of any default on the part of the Principal, written notice thereof, with a verified statement of the facts showing such default and the date thereof, shall within ten days after such default, be delivered to the Surety at its office, in Baltimore, Maryland.

Second. That the Surety shall not be liable for any deposits made after any such defaults.

Third. That in the event of default on the part of the Principal, the Surety shall be liable hereunder for only such proportion of the total loss sustained by the obligee, as the penalty of this bond shall bear to the total penalty of all bonds and securities furnished to the

Obligee and in no event shall the Surety be liable hereunder in excess of the penalty of this bond.

Fourth. That in the event of loss, the Surety shall, before payment, have granted unto it by the Obligee, a full, complete and clear title by the assignment from the Obligee of such proportion of the Obligee's claim against said Principal as may be sustainable under the condition and provisions of this bond.

Fifth. No suit at law or in equity shall be sustainable under this bond unless commenced within ninety days from the date of expiration, cancellation, or default.

Sixth. That the Surety shall have the right to terminate its suretyship, under this obligation, by serving notice of its election so to do upon said Obligee or its lawful representatives, and thereupon the Surety shall be discharged from any and all liability hereunder, for any default of the Principal, occurring after the expiration of fifteen days after service of such notice.

Seventh. If the Surety so elect, this obligation may be continued for any subsequent pediod by continuation certificate signed
22 by the Surety, by its president or vice-president, under seal, and attested by its Secretary or Assistant Secretary.

In testimony whereof, the said Principal has caused this bond to be signed by its —— President and —— and its corporate seal to be hereto affixed, and the said The United States Fidelity and Guaranty Company has caused its corporate seal to be hereto affixed, and the bond executed by its attorney-in-fact.

All done upon the date first hereinbefore mentioned.

COLUMBIA BANK AND TRUST COMPANY,

By —— ——, *President.*

—— ——, *Secretary.*

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By —— ——, *Its Attorney.*

Signed, sealed and delivered in the presence of:

—— ——.

—— ——.

—— ——.

—— ——.

23 EXHIBIT "B."

STATE OF OKLAHOMA,
Logan County, ss:

To the United States Fidelity and Guaranty Company of Baltimore, Maryland.

GENTLEMEN: Pursuant to the terms and conditions of your Depository Bond No. —, Columbia Bank & Trust Company, a corpora-

tion of Oklahoma City, Oklahoma, as principal, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, and particularly that part of said bond which provided as follows: "First:—That in the event of any default on the part of the principal, written notice thereof, with a verified statement of the facts showing such default and the date thereof, shall, within ten days after such default be delivered to the Surety at its office in Baltimore, Maryland," your are hereby notified of the facts showing said default on the part of said principal in accordance with notice of such default hereto attached.

That on the 18th day of May, A. D. 1909 the Columbia Bank & Trust Company, a corporation of Oklahoma City, Oklahoma, as principal and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, made and executed to the State of Oklahoma and delivered the same to the Commissioners of the Land Office of the State of Oklahoma, one certain written bond and obligation, by the terms and conditions of which the said principal and surety bound and obligated themselves to the State of Oklahoma in the full sum of Fifty Thousand ($50,000.00) Dollars, upon the condition that said principal having been designated as Depository for the funds and money that shall come into the possession of the Commissioners of the Land Office of the State of Oklahoma by virtue of the performance of the official duties of the said
24 Commissioners of the Land Office as provided by the Laws of Oklahoma and the Acts of Congress, would during the term beginning at 9:00 o'clock A. M. on the 18th day of May, 1909 and ending within the close of banking hours on the 17th day of May 1910, well and faithfully perform the trust reposed in it by such designation and would promptly pay all funds and moneys so deposited with it, either on legal order or on the check or draft of the Commissioners of the Land Office or the Secretary to the Commissioners of the Land Office of the State of Oklahoma and should well and truly indemnify the said obligee from any and all losses which it may suffer or sustain during the period aforesaid by reason of such designation of such principal as such depository.

That on the 22d day of May, 1909 the said bond was duly accepted by the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma and that afterwards and prior to the 29th day of September, 1909 the said Commissioners of the Land Office did deposit and place in the possession of the said principal, certain sums of money aggregating the sum of Fifty Thousand ($50,000.00) Dollars and which amount belongs to and is a part of the permanent Common School Fund of the State of Oklahoma and under the control and management of the Commissioners of the Land Office of the State of Oklahoma, and said sum, to-wit: Fifty Thousand ($50,000.00) Dollars deposited as aforesaid, was deposited and placed in the possession of said principal upon the faith and according to the terms and conditions of said written bond or obligation aforesaid.

That on the 29th day of September, 1909 and during banking hours on said day, the Commissioners of the Land Office of the

State of Oklahoma, presented to W. L. Norton, the duly elected and acting President of said principal in Oklahoma City, Oklahoma, one certain check for the sum of Fifty Thousand ($50,000) Dollars, dated Guthrie, Oklahoma, September 29, 1909, and payable to the order of Ed O. Cassidy, Secretary to the Commissioners of
25 the Land Office of the State of Oklahoma, and signed by Ed O. Cassidy, Secretary *of* the Commissioners of the Land Office of the State of Oklahoma and countersigned by Ray O. Weems, Accountant, which said check was drawn and issued against the aforesaid deposit of Fifty Thousand ($50,000.00) Dollars, and the said W. L. Norton, then and there notified the Commissioners of the Land Office of the State of Oklahoma that the business affairs and assets of every kind and nature of said principal were not under his control or in his possession as president and were not under the control or in the possession of any of the officers of said principal, and payment of said check and the amount thereof was refused and said W. L. Norton, president of said principal then and there notified the said Commissioners of the Land Office that the business affairs and assets of every kind and nature of said principal, including its banking business, were in the possession and control of A. M. Young, Bank Commissioner of the State of Oklahoma.

That on the 29th day of September, 1909 the Commissioners of the Land Office of the State of Oklahoma presented the above described check to said A. M. Young, Bank Commissioner of the State of Oklahoma, at the place of business of said principal in Oklahoma City, Oklahoma and during banking hours on said day and demand for the full payment of the said sum of Fifty Thousand ($50,000.00) Dollars, but payment of said check was by said A. M. Young, Bank Commissioner of the State of Oklahoma, refused and payment of the said amount of Fifty Thousand ($50,000.00) Dollars was refused.

That following the above demand for the payment of the above described check and money, written demand was made by the Commissioners of the Land Office upon the said principal and A. M. Young, Bank Commissioner, the person having charge of the business, affairs and assets of said principal for the payment of said sum but payment was refused and the said principal has refused and still refuses to pay to the Commissioners of the Land
26-27 Office of the State of Oklahoma or their Authorized Agents for the use and benefit of the State of Oklahoma, the aforesaid amount of Fifty Thousand ($50,000.00) Dollars.

THE STATE OF OKLAHOMA,
By THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA,
By —— ——, *Governor & Chairman.*

Attest:

—— ——,
Secretary to the Commissioners of the Land Office of the State of Oklahoma.

EXHIBIT "C."

In re Col. Bank & Trust Co.

September 30, 1909.

To the United States Fidelity and Guaranty Company of Baltimore, Maryland.

GENTLEMEN: Demand is hereby made upon you for the payment of the sum of Fifty Thousand ($50,000.00) Dollars. This demand is made in pursuance of the terms and conditions of Depository Bond No. — Columbia Bank & Trust Co., A Corporation, located at Oklahoma City, in the State of Oklahoma as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, default having been made by said principal as shown and set out in a verified statement of facts hereto attached.

Respectfully,
STATE OF OKLAHOMA,
By THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA,
By —— ——, *Governor & Chairman.*

Attest:
—— ——,
Secretary to the Commissioners of the Land Office of the State of Oklahoma.

Endorsed: No. 454. The State of Oklahoma and The Commissioners of the Land Office on the relation etc. Plaintiffs, vs. The U. S. F. & G. Co. Defendant, Petition, Filed in the Superior Court of Oklahoma County, Dec. 24, 1909, W. C. Hughes, Clerk By Nina E. Babcock, Deputy.

28 STATE OF OKLAHOMA,
Oklahoma County, ss.

In the Superior Court in and for said County.

No. 454.

THE STATE OF OKLAHOMA et al., Plaintiff,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.

Answer.

Comes now the defendant in the above entitled cause and for answer to the petition of the plaintiff says:

First. It denies each and every allegation in said petition contained except such as are hereinafter specifically admitted.

Second. It denies that exhibit "A" attached to said petition is an correct copy of the bond sued on.

Third. For a further defense this defendant says that one of the express terms and conditions of the bond sued on, was,

"That in the event of default on the part of the principal, the surety shall be liable hereunder for only such proportion of the total loss sustained by the obligee, as the penalty of this bond bear- to the total penalty of all bonds and securities furnished to the obligee and in no event shall the survey be liable hereunder in excess of the penalty of the bond."

and the defendant says that under the laws of the State of Oklahoma then in force there was what was known as a guaranty fund created by assessments upon all of the banks and trust companies doing business in the State. That the purpose of said fund was to protect all depositors in such banks and trust companies against loss by reason of the failure of any one of such institutions. That a large sum of money was in the possession of the custodian of said guaranty fund and that of this sum of money the said Columbia Bank and Trust Company, principal in said bond, had paid its full proportion based on its deposits and that its deposit account was more
29 than twice as large as the deposit account of any other state bank or trust company in the State of Oklahoma, and that that fund theretofore, had been created by the contributions of the various institutions subject to the law and in large part by the assessments paid by the Columbia Bank and Trust Company.

Defendant further says that said guaranty fund was a security furnished to the obligee in the bond sued on as well as to all other depositors in said bank and was co-extensive with and equal to the obligation of this defendant, and that therefore this defendant was not at the time of the failure of the Columbia Bank and Trust Company liable to this plaintiff for more than 50% of the loss sustained by the plff. on account of the default of the said Columbia Bank and Trust Co. and the defendant further alleges and states that the assets of the said Columbia Bank and Trust Company were equal to 80% of its liability to depositors and creditors, and that such assets came into the possession of the plaintiffs, and were received by said plaintiffs, and that therefore the total liability of this defendant on said bond at that time did not exceed 10% of the face value of the bond.

Fourth. For a further defense the defendant says that one of the express terms and conditions upon which said bond was issued was:

"That in the event of loss, the surety shall, before payment, have granted unto it by the obligee, a full complete and clear title by the assignment from the obligee of such proportion of the obligee's claim against said principal as may be sustainable under the conditions and provisions of this bond."

and defendant says that the said Columbia Bank and Trust Company failed on September 29, 1909; that immediately thereafter the plain-

tiff, the State of Oklahoma, took possession of said bank and all of its assets; said possession being taken by the State through its bank commissioners and its banking board and that immediately thereafter this defendant demanded of the said plaintiffs, through its said officers aforesaid, that the assets of said bank in their possession and under their control be applied to the payment of the said debt, but the said plaintiffs through its said officers then refused to do so and has never conveyed to the defendant a full, complete and clear title by an assignment of its claim against the said Columbia Bank and Trust Company as required by the provisions of the bond sued on herein set out, but that the plaintiff and all of its officers have at all times failed and refused to assign said claim or any part thereof to this defendant, and that therefore the plaintiffs are not entitled to recover in this action.

Fifth. For a further defense the defendant says that the plaintiffs through its bank commissioner and the banking board of the said State on Sept. 29, 1909, took possession of the said Columbia Bank and Trust Company claiming that it was insolvent. That they at once proceeded to pay off the claims of depositors out of the assets of the said bank and out of the depositors' guaranty fund of the State of Oklahoma, which was in their possession and subject to their control. That the deposits of said bank aggregate the sum of to-wit, $3,000,000.00; that the assets of said bank aggregate the sum of to-wit, $2,400,000.00, and that therefore the assets of said bank were sufficient to and did pay 80% of the deposits. That the said plaintiffs through its said bank commissioner and banking board used a large sum of money, to-wit, $600,000.00 out of the depositors' guaranty fund of the State of Oklahoma with which to pay the remaining claims of depositors, and defendant says that by reason of the facts herein stated the claim of the plaintiffs on account of this $50,000.00 deposit herein sued for has been paid to the full extent of 80% out of the assets of said bank, and that the remaining 20% constitutes the loss on account of said bond, for which this defendant is liable for one-half, and that the remaining one-half therefore has been paid by reason of the facts and circumstances herein set forth out of the said depositors' guaranty fund and that this defendant remains liable only for the sum of $5,000.00 which it is ready and willing to pay.

Sixth. For a further defense the defendant says that at the time of the transactions herein complained of the commissioners of the land office of the State of Oklahoma consisted of the Governor, the Auditor, president of the Board of Agriculture, Secretary of State, and Superintendent of Public Instruction, while the banking board of the State consisted of the Governor, the Auditor, the President of the Board of Agriculture, the Lieutenant Governor and the State Treasurer; so that the governor, the Auditor and the President of the Board of Agriculture composed a majority and a quorum of both boards. And that when said Columbia Bank and Trust Company failed on September 29, 1909, Hon. C. N. Haskell was governor of the State of Oklahoma and chairman of the State Banking Board and chairman of the Commissioners of the Land Office; that he was the dominating factor on both boards and that he

took personal control of the affairs of the said Columbia Bank and Trust Company actively directing the management thereof. That the bank commissioner was an appointee of the said Governor and that pursuant to the Governor's directions the bank commissioner took possession of the bank and of all of its affairs and assets and received such sums out of the depositor's guaranty fund as were necessary to pay off the depositors of said bank. That notwithstanding the fact that the assets of said bank were sufficient to pay 80% of its depositors and that the guaranty fund was sufficient to pay the remaining 10% the said commissioners of the land office and the banking board and the said bank commissioner, all acting under the authority and control of the said Governor refused to apply the fund in the possession of the State to the payment of the deposit of the State, but demanded payment in full from this defendant. That this defendant declined to pay the full amount of said loss, but demanded that the assets of said bank be applied to the payment of the deposits secured by its bond pro rata with the payment of other depositors and that the deficit be paid out of the guaranty fund. That the said banking board and the bank commissioner refused to make this payment and the said commissioners of the land office refused to demand it.

32 Whereupon this defendant filed a motion in the district court of Oklahoma County, wherein the administration of the affairs of said bank was pending, to require the bank commissioner to pay these plaintiffs and to enjoin it from paying out all of the resources of said bank and the guaranty fund to the exclusion of the deposit of these plaintiffs, and said district — sustained the motion of this defendant, but its order was reversed by the Supreme Court of the State of Oklahoma .

The defendant further says that if it be true that the deposit of the state of Oklahoma secured by the bond sued on is still unpaid that it had been discharged from further liability thereon by the misconduct and neglect of the plaintiffs acting through its officers as aforesaid. And defendant further says that by reason of the facts and circumstances herein stated it was never liabl eto the plaintixs for more than $5,000.00, and that if section 323 of the Compiled Laws of 1909 (Session Laws 1907 and 1908, Chapter 6, Article 2, Section 6, Page 141) is construed by denying the plaintiff and this defendant the right to participate pro rata in the assets of the Columbia Bank and Trust Company; that said section is in conflict with the Fourteenth Amendment of the Constitution of the United States in that it takes from this plaintiff and from this defendant their property without due process of law and denies to them the equal protection of the law, and that it is further in conflict with the section 10 of Article 1 of the Constitution in that it is a law impairing the obligation of contracts. And defendant further says that the said Columbia Bank and Trust Company paid into the guaranty fund its regular assessments and thereby acquired the right to have its depositors paid out of said fund, and that if the act of the Legislature creating the depositors' guaranty fund, being Article 2 of Chapter 6 of the Session Laws of 1907-1908, which includes the above named

section is so construed as to deprive the plaintiff in this case of all right to participate in said guaranty fund and to deprive the defendant of its right to pro rate the loss with said guaranty fund;
33 34 that said act of the legislature is in conflict with the Fourteenth Amendment of the Constitution and with section 10 of Article 1 of the Constitution of the United States in that it takes the property of the said Columbia Bank and Trust Company, and of the plaintiffs and of the defendants without due process of law and impairs the obligation of the contract between this defendant and the said Columbia Bank and Trust Company and the imposed contract between the Columbia Bank and Trust Company and the other banks subject to the guaranty law and the depositors therein.

Wherefore the defendant says that it is not liable to the plaintiff in this cause to the excess of the sum of $5,000.00 for which sum it offers hereby to confess judgment and it prays that with said exception it may go hence and recover its costs.

AMES, CHAMBERS, LOWE AND RICHARDSON,
Attorneys for the Defendant.

Endorsements: No. 454. Superior Court. The State of Oklahoma et al., Plaintiffs, vs. The United States Fidelity and Guaranty Company, Defendants. Answer. Filed in the Superior Court of Oklahoma County, Oklahoma, July 14th, 1913. Harold Lee, Clerk by W. E. Vance, Deputy.

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35 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the Superior Court in and for said County and State.

No. 454.

STATE OF OKLAHOMA et al., Plaintiffs,

vs.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.

Demurrer to Answer of the Defendant.

Now comes the plaintiffs in the above numbered and entitled cause and demur to the answer of the defendant herein as follows:

1st. The plaintiffs demur to the third section of said answer because the allegations of said third section are insufficient in law to constitute a defense *to constitute a defense* to the cause of action of plaintiffs as set out in plaintiffs' petition herein;

2nd. These plaintiffs demur to the fourth section of said answer because the allegations of said fourth section are insufficient in

law to constitute a defense to the cause of action of plaintiffs as set out in plaintiffs' petition herein;

3rd. These plaintiffs demur to the fifth section of said answer because the allegations of said fifth section are insufficient in law to constitute a defense to the cause of action of plaintiffs as set out in plaintiffs' petition herein;

4th. These plaintiffs demur to the sixth section of said answer because the allegations of said sixth section are insufficient
36–37 in law to constitute a defense to the cause of action of plaintiffs as set out in plaintiffs' petition herein.

5th. These plaintiffs demur to the third, fourth, fifth and sixth sections of said answer because the allegations of said four sections of said answer, taken separately or taken together, fail to state a defense to the cause of action of plaintiff as set out in plaintiffs' petition herein.

Wherefore, these plaintiffs pray the sufficiency of the above demurrers, and each of them.

LEDBETTER, STUART & BELL,
Attorneys for Plaintiffs.

Endorsements: No. 454. In the Superior Court of Oklahoma County, State of Oklahoma. The State of Oklahoma, et al., Plaintiffs, vs. The United States Fidelity and Guaranty Company, Defendant. Demurrers. Filed in the Superior Court of Oklahoma County, Okla., Aug. 1913. Harold Lee, Clerk, by Harold Lee.

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38 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the Superior Court in and for said County and State.

No. 454.

STATE OF OKLAHOMA et al., Plaintiffs,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant.

Journal Entry.

On this Thursday, September 18th, 1913, the same being a regular judicial day of the present term of this court, came the parties hereto, and by consent of all parties it was agreed that Lee Cruce, Governor of the State of Oklahoma, be substituted as one of the plaintiffs herein, in the place and stead of Charles N. Haskell, the predecessor in office of said Lee Cruce; that Benjamin F. Harrison, Secretary of State of the State of Oklahoma, be substituted as party plaintiff herein in the place and stead of Bill Cross, the predecessor in office of said Benjamin F. Harrison; that J. C.

McClelland, Auditor of the State of Oklahoma, be substituted as party plaintiff herein in the place and stead of M. E. Trapp, the predecessor in office of said J. C. McClelland; that R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, be substituted as party plaintiff herein in the place and stead of E. D. Cameron, the predecessor in office of said R. H. Wilson; and that G. T. Bryan, President of the Board of Agriculture of the State of Oklahoma, be substituted as party plaintiff herein in the place and stead of J. P. Connors, the predecessor in office of said
39–64 G. T. Bryan; said Lee Cruce, Governor, Benjaimin F. Harrison, Secretary of State, J. C. McClelland, Auditor, R. H. Wilson, Superintendent of Public Instruction, and G. T. Bryan, President of the Board of Agriculture, composing and being, at present, the Commissioners of the Land Office of the State of Oklahoma. And thereupon came on to be heard the demurrers filed herein by plaintiffs to the third, fourth, fifth, and sixth sections of the answer of the defendant herein; and upon the hearing of said demurrers, the plaintiffs appeared by their attorneys, Messrs. J. H. Chambers, and Ledbetter, Stuart & Bell, and the defendant, United States Fidelity & Guaranty Company, appeared by its attorneys, Messrs. Ames, Chambers, Lowe & Richardson; and the Court having heard the argument on said demurrers and being fully advised in the premises, finds that the law is for the plaintiffs, and that said demurrers each and all should be sustained.

It is, therefore, ordered, adjudged, and decreed by the Court that each and all of said demurrers be and the same are hereby sustained, to which ruling of the court the defendant United States Fidelity & Guaranty Company then and there in open court duly excepted and still excepts.

EDWARD DEWES OLDFIELD, *Judge.*

O. K. as to form

LEDBETTER, STUART & BELL,
Attorneys for Plaintiffs.

C. B. A.,
Attorneys for Defendant.

Endorsements: No. 454. In the Superior Court of Oklahoma County, State of Oklahoma. The State of Oklahoma, et al., Plaintiffs, vs. The United States Fidelity & Guaranty Co., Defendant. Journal Entry. Filed in the Superior Court of Oklahoma County, Okla., Oct. 3, 1913. Harold Lee, Clerk, by W. E. Vance, Deputy.

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65 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the Superior Court in and for said County and State.

No. 454.

THE STATE OF OKLAHOMA and LEE CRUCE, Governor of the State of Oklahoma; Benjamin F. Harrison, Secretary of State of Oklahoma; J. C. McClelland, Auditor of the State of Oklahoma; G. T. Bryan, President of the State Board of Agriculture of the State of Oklahoma, and R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, Composing the Commissioners of the Land Office of the State of Oklahoma, ex Rel. J. H. Chambers, Attorney for Commissioners of the Land Office, Plaintiffs,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Defendant.

Journal Entry.

On this Friday, the 3rd day of October, 1913, the same being a regular judicial day of the present term of this court, the above numbered and entitled cause came on to be heard in its regular order; and on the hearing of said cause the plaintiffs appeared by their attorneys, Messers. J. H. Chambers, and Ledbetter, Stuart & Bell, and the defendant appeared by its attorneys, Messers. Ames, Chambers, Lowe & Richardson; and both parties waived a jury, and submitted all matters of both fact and law to the court; and the court having heard the evidence and being fully advised in the premises finds for the plaintiffs against the defendant in the sum of Fifty-six Thousand and Sixteen Dollars ($56,016.00).

It is therefore, ordered, adjudged and decreed by the court that the plaintiffs, the State of Oklahoma, and Lee Cruce, Gove-nor of
the State of Oklahoma, Benjamin F. Harrison Secretary of the
66 State of Oklahoma, J. C. McClelland, Auditor of the State of Oklahoma, G. T. Bryan, President of the Board of Agriculture of the State of Oklahoma, and R. H. Wilson, Superintendent of Public Instruction of the State of Oklahoma, composing the Commissioners of the Land Office of the State of Oklahoma, do have and recover of the defendant, The United States Fidelity & Guaranty —, a corporation, said sum of Fifty-six Thousand and Sixteen Dollars ($56,016.00) with interest thereon from this date at the rate of 3% per annum. For all of which let execution issue, to which the defendant excepted. And on Saturday, the 4th day of October, 1913, also a regular day of said term of this court, came on to be heard the motion for new trial of the Defendant, The United States Fidelity & Guaranty Company; and on the hearing of said motion the plaintiffs appeared by their attorneys Messers J. H. Chambers, Ledbetter, Stuart & Bell, and defendant appeared by

its attorneys, Messers. Ames, Chambers, Lowe & Richardson; and the court having heard said motion read and being full- advised in the premises, is of the opinion that the law is for the plaintiffs, and that said motion should be overruled.

It is therefore, ordered, adjudged and decreed by the court that said motion for new trial be and the same is hereby in all things overruled. To the overruling of which motion the defendant, The United States Fidelity & Guaranty Insurance Company in open court then and there duly excepted; and the said defendant praying an appeal to the Supreme Court of the State of Oklahoma, and asking for an extention of time in which to make and serve a case made, and it appearing to the court that good and sufficient cause exists for the granting of such extension, it is ordered, adjudged, and decreed by the court that said prayer for such extension of time be granted and that a case made on appeal herein may be made and served on plaintiffs by defendant, within sixty (60) days
67–82 from this date; plaintiffs to have ten (10) days after such service in which to suggest amendments to said case made; said case made to be settled on five (5) days' notice in writing by either party. Petition in error to be filed in the Supreme Court within ninety (90) days from this date.

It is further ordered by the court that no execution shall issue in this cause until after the expiration of thirty (30) days from this date; and that upon the filing of a stay bond for the sum required by law, and conditioned as required by law, within thirty (30) days from this date, by the defendant, that no execution issue on this judgment until after the final decision on such appeal by the Supreme Court of the State of Oklahoma, provided petition in error is filed in said Supreme Court within ninety (90) days from this. date, as above shown.

EDWARD DEWES OLDFIELD, *Judge.*

O. K. as to form.
AMES, CHAMBERS, LOWE &
RICHARDSON,
Attys. for Defendant.
JAS. H. CHAMBERS,
LEDBETTER, STUART & BELL,
Attys. for Plaintiffs.

Indorsements: No. 454. In the Superior Court of Oklahoma County, State of Okla. The State of Oklahoma et al., Plaintiffs, vs. The United States Fidelity & Guaranty Co., Defendant. Journal Entry. Filed in the Superior Court of Oklahoma County, Okla., Oct. 3, 1913. Harold Lee, Clerk, by W. E. Vance, Deputy.

* * * * * * *

83 And thereafter, to-wit, on October 9th 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, October Term, 1917, October 9th, 1917, First Judicial Day.

6033.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Plaintiff in Error,

vs.

STATE OF OKLAHOMA et al., Defendant in Error,

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Hardy, J.

All the Justices concur.

84 Filed Oct. 9, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6033.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, LEE CRUCE, Governor of the State of Oklahoma; Benjamin F. Harrison, Secretary of State; J. C. McClelland, Auditor; R. H. Wilson, Superintendent of Public Education, and G. T. Bryan, President of the Board of Agriculture, Composing the Commissioners of the Land Office of the State of Oklahoma, on the Relation of J. H. Chambers, Their Attorney, Defendants in Error.

Syllabus.

Section 7943, Comp. Laws 1909 provided a specific system for the protection of any part of the permanent school fund deposited in any bank or trust company, and the protection extended to general depositors by virtue of the police power of the state, by virtue of Sec. 323, Comp. Laws 1909 which created the depositors' guaranty fund did not apply to deposits of the permanent school fund.

Where in May 1909 the Commissioners of the Land Office deposited certain monies belonging to the permanent school fund in a certain institution which thereafter became insolvent and passed into the hands of the bank Commissioner on September 29, 1909 who administered its affairs under the banking laws of the state and where the assets of said institution were insufficient to pay the general depositors protected by the depositors' guaranty fund the deposit of the Commissioners of the land office was not entitled to share in the assets of said institution.

Section 323, Comp. Laws of 1909 as construed herein does not deprive a surety who executed a bond under the provision of Sec. 7943, Comp. Laws 1909 securing a temporary deposit of any of the school monies of the state and who is compelled to repay same of its property without due process of law.

An unconstitutional discrimination does not exist by reason of the guaranty of general deposits under Sec. 323 and the security required for deposits of school funds under Sec. 7943.

85 Error from the Superior Court of Oklahoma County.

Hon. Edward D. Oldfield, Trial Judge.

Affirmed.

Ames, Chambers, Lowe & Richardson, for Plaintiff in Error.
S. P. Freeling, Attorney General, Ledbetter, Stuart & Bell, for Defendants in Error.

Opinion of the Court.

By HARDY, *J.*:

This action was commenced by the state and the officers composing the commissioners of the land office on the relation of J. H. Chambers, their attorney, against the United States Fidelity & Guaranty Company to recover $50,000.00 on a bond executed by it as a depository bond for the Columbia Bank & Trust Company. Answer was filed consisting of a general denial and certain affirmative defences, to which demurrer was interposed by plaintiffs, and by the court sustained as to all of said defences except the general denial, and exceptions saved to the ruling of the court. Thereafter the case came on for trial, and resulted in judgment in favor of Plaintiff for the full amount prayed, and defendant brings the case here for review.

It is urged that plaintiffs were entitled to share in the assets of the Columbia Bank & Trust Company, and that defendant was entitled to an assignment of plaintiff's claim against the Columbia Bank & Trust Company, and that because plaintiffs did not apply the assets which came into their hands by reason of the insolvency of the

Columbia Bank & Trust Company, ratably to the payment of the deposit to secure which the bond sued upon was given, that defendant has been proportionally discharged from liability upon its obligation.

86 Counsel insist that previous decisions of this — have declared the law to be that deposits of the character herein involved are not entitled to payment from the depositors' guaranty fund but that this court has not yet decided the question as to whether such deposits were entitled to share in the distribution of the assets of an insolvent bank or trust company. Sec. 323, Comp. Laws of 1909 makes it the duty of the bank commissioner in the event he shall take charge of a bank or trust company to pay the depositors of the Bank or Trust Company in full, and provides that when the cash available or that which can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the banking board shall draw from the depositors' guaranty fund and from additional assessments if required, an amount necessary to make up the deficiency, and gives the state first lien upon the assets of said institution and all other liabilities against the stockholders, officers and directors and against all persons, corporations or firms, which may be enforced by the state for the benefit of the depositors' guaranty fund. Construing this statute in a number of cases, the rule has been announced that monies deposited in an institution by the commissioners of the land office under the provisions of Sec. 7943, Comp. Laws of 1909, were not such deposits as fell within the purview of this section of the statute. Counsel concede that such has been the uniform holding of the court, but contend that such holding is wrong, and should be reversed. The question has been examined and the rule announced so often that it may well be considered as the settled views of this court upon that proposition.

Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co. 33 Okla. 535, 126 Pac. 556.

Langford v. Okla. Eng. & Ptg. Co., 35 Okla. 404, 130 Pac. 278.

Lovett v. Langford, 145 Pac. 767.

Langford v. Schroeder, 147 Pac. 1049.

Capitol State Bank v. Western Casualty & Guaranty Co., 149 Pac. 149.

87 In the case of Columbia Bank & Trust Company against The United States Fidelity & Guaranty Company, supra, the bank commissioner took possession of the bank and its assets, and thereafter made application to the District Court of Oklahoma County for an order authorizing him to sell certain assets of the bank. The U. S. Fidelity & Guaranty Co. filed its petition in intervention, alleging that it was the purpose of the bank commissioner to repay to the State Banking Board the depositors' guaranty fund which had been advanced by it in preference to the deposit secured by the bond of the Surety Company, and prayed that the bank commissioner be enjoined from paying out any of the assets re-

maining in his hands to any creditors of the bank in preference to the state and the commissioners of the land office on account of the deposits secured by the bond of said surety company, and that the bank commissioner be restrained from repaying to the banking board the guaranty fund advanced to him, or any part thereof, prior to the payment in full of the deposit secured by said bond. It was stated by the court that one of the questions presented for consideration was whether the deposit of the commissioners of the land office was entitled to participate pro rata in the distribution of the assets of the bank. In discussing this question the contention of the Surety Company was said to be that the deposit of the commissioners of the land office ought to be treated as all other deposits and that the commissioners ought to participate pro rata in the distribution of the assets of the bank, and that after the assets were exhausted, if there be a deficit, it ought to be paid out of the guaranty fund and until the guaranty fund was exhausted the surety should not be called upon to meet the obligation of its bond. The court declined to adopt this view, and in considering Section 323, supra, and Section 7943, Comp. Laws 1909 held that Section 323 was enacted in pursuance of the police power of the state, acting in its sovereign capacity in behalf of its people and their interest, and not in its own behalf, and that by virtue of said section it was not intended to protect such deposits as here involved by the guaranty fund, and that section 7943, specif-
88 ically related to the funds of the state itself, and the broad subject embraced within its purview was the temporary deposit and protection of the permanent school fund until it could be invested in the securities prescribed by law. This decision determined adversely to the contention of defendants the question as to whether plaintiffs were entitled to participate in the distribution of the assets of the bank. The primary purpose of the bank guaranty law being to guaranty the payment of general deposits, excluding deposits of the character in question, the state is given a first lien upon the assets of the bank for the protection of the guaranty fund, and the bank commissioner is specifically charged with the duty of applying the cash on hand and assets which can be converted into cash to the payment of deposits intended to be secured. It would be reasoning in a circle to say that the deposit of plaintiffs was not entitled to be paid out of the guaranty fund and yet would be entitled to participate in the assets of the insolvent institution. If that be permitted the lien of the state for the benefit of the guaranty fund is subordinated to the payment of plaintiffs' deposit and thus indirectly would be accomplished that which was not the intent of the law, and the purpose of the law be defeated. In Lankford, State Bank Comm. v. Oklahoma Eng. & Ptg. Co., it was said:

"The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being pro rated and distributed among the general

creditors of the bank, in the manner contended for by counsel for defendant in error."

In Capitol State Bank against Western Casualty & Guaranty Company, the court said:

"The state was bound to protect the general creditors of the depositors' guaranty fund and recoup the loss so far as possible by the sale of the assets of the failed bank upon which the statute gave it a preferred lien. If the sale of the assets of the failed bank did not realize a sufficient sum to pay any of the creditors of the failed bank except the general depositors who were protected by the depositors guaranty fund, it would follow that all other creditors would be compelled to suffer the loss of their claims."

89 These expressions of the court show that it has uniformly entertained the view that a deposit not protected by the depositors' guaranty fund was not entitled to share in the assets of an insolvent institution until the depositors' guaranty fund had been repaid all sums advanced therefrom. This appears to be the clear intent and meaning of the statute, and when it is held that the deposit of plaintiffs was not protected by the depositors' guaranty fund it necessarily follows that the depositors' guaranty fund is to be reimbursed from the assets of the insolvent bank before plaintiffs would be entitled to share in the distribution of the assets; and the assets being only sufficient to pay eighty per cent of the deposits there would remain nothing from which the guaranty fund could be reimbursed, and therefore there were no assets remaining in which plaintiffs were entitled to participate. This being true, plaintiffs had no claim which could be assigned to the defendant under that provision of the bond entitling it to an assignment of plaintiffs' right, and there could be no breach of said condition unless there was some right which could be assigned. Neither would defendant be released because plaintiffs had failed to apply the assets of the insolvent institution to the payment of its deposit because the assets, in the first place, did not go into plaintiffs' hands, and in the second place, as already demonstrated, they were not entitled to participate in the distribution thereof. Sections 1043 and 1056, Rev. Laws 1910, do not apply to the case at bar but defendant's rights must be determined under Sec. 323 and 7943 as construed in former opinions, and applied to a similar state of facts.

This construction of the statutes does not take the property of plaintiffs or defendant without due process of law. Plaintiffs make no such contention, and therefore we pass to this contention, as applied to the defendant. In order for this statute to have this effect, it must be made to appear that defendant has been deprived of some right given it by statute or under its contract. The statutes referred to are as much a part of the bond as if they were

90 specifically written therein or made so by its terms.

Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co. 33 Okla. 535.

Southwestern Surety Ins. Co. v. Davis, 156 Pac. 214.

The law was in force at the time the bond was executed and delivered and the bond was executed in pursuance of the requirements of Section 7943 for the purpose of securing the deposit of the plaintiffs and defendant must be held to have voluntarily executed same for hire in view of the law and therefore did so with knowledge beforehand that plaintiffs' deposit would not be protected by the depositors' guaranty fund, and would not be permitted to participate in the distribution of the assets of the insolvent institution until the guaranty fund had been reimbursed for any advances made therefrom. With this view of the case the contention that the statute deprives defendant of its property without due process of law cannot be maintained because it appears that no property or contract right has been violated or impaired in the least but on the contrary the statute which entered into and became a part of the contract has been applied and enforced according to its spirit and letter. Neither can it be said that such condition deprives defendant of the equal protection of the law because of the discrimination between the deposit of plaintiff and other depositors. The validity of this legislation was sustained in Noble State Bank v. Haskell, et al., 22 Okla. 48, 97 Pac. 590, where it was sustained as a valid exercise of the police power of the State. That case was appealed to the Supreme Court of the United States, and affirmed in Noble State Bank against Haskell, 219 U. S. 104, 55 L. Ed. 112, where it was said that the statute was well within the state's constitutional power. However, addressing ourselves to the precise point, the mere fact that the distinction is made between general deposits and deposits of the character made by plaintiffs secured in the manner that such deposit was secured does not of itself render the legislation obnoxious to the equality clause of the Federal constitution. The
91 power of the legislature of a state to classify persons and objects in legislation has a wide range of discretion, and while the classification must be reasonable and not arbitrary, there is no precise application of the rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons or things. The question is when the classification has been made whether there is any reasonable ground for it or whether it is only simply arbitrary based upon no rule of distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect. If the constituents of each class are affected alike the rule of equality prescribed by the cases is satisfied.

Trustees, Executors & Securities Co. v. Hooton, 157 Pac. 293.

German Alliance Ins. Co. v. Lewis, 232 U. S. 389, 58 L. Ed. 1011.

Nicol v. Amos, 173 U. S. 509, 43 L. Ed. 786.

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909.

Magoun v. Savings Bank, 170 U. S. 283, 42 L. Ed. 1037.

All of the decisions of this court construing this law have sustained

the classification made. In Assaria State Bank v. Dooley, 219 U. S. 121, 55 L. Ed. 123, the Supreme Court of the United States sustained the depositors' guaranty law of the state of Kansas. One of the contentions there made was that plaintiffs (who were a number of state banks) would theretofore have been entitled to share pro rata in the assets of an insolvent bank to which they had given credit but after the passage of said law that depositors with such of their debtors that should come in the guaranty system would be preferred. In the second paragraph of the syllabus, it is stated, "An unconstitutional discrimination does not result from a preference of ordinary depositors from other creditors given by the state statute creating the bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund." Another discrimination in that case was between unincorporated banks and banks not having a surplus of ten per cent who were not entitled to the benefits of the act. These discriminations were held to be not fatal but within the power of the state.

92 By Sec. 323, under which general deposits were protected by the depositors' guaranty fund, the state prescribed one method of protection for its citizens and reserved the matter of the protection of the deposits of the school fund by Sec. 7943 where another plan was provided. This classification is not arbitrary but is based upon good reason. General depositors are citizens of the state and one of the chief purposes of the law is to secure the currency of checks drawn against such deposits and give security to banking institutions, and prevent, as far as possible financial depression and loss to the individual.

The protection of the public welfare, by making secure the currency of checks and rendering safe the almost compulsory resort of depositors to the banks as the only available means of keeping money on hand was sufficient reason for the distinction made and the priority of payment given to general depositors was incidental to the accomplishment of the general object and purposes of the law. The security of the school fund was provided for by requiring the securities enumerated in Section 7943, which the state might lawfully require before permitting the funds to be deposited, but general depositors could not exact such security and yet were all but compelled to avail themselves of the facilities offered by banking institutions and it was the purpose of the law to give security for the repayment of such deposits, and the state in the exercise of its police power for the benefit of its citizens could lawfully require this to be done. The reasons enumerated were sufficient to sustain the classification as a valid exercise of the legislative power of the state and these statutes prescribe the rule by which the rights of the two classes of depositors are regulated, and the general rule invoked can have no application here. The rights of the parties to this litigation are not affected by subsequent changes in the law regulating the depositors' guaranty fund but must be determined by the law as it existed when the de-

93–94 posit was made, and when the Columbia Bank & Trust Company passed into the hands of the bank commissioner.

The Judgment is Affirmed.

All the Justices concur.

* * * * * * *

95–96 And thereafter, to-wit, on October 30th, 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, October Term, 1917, October 30th, 1917, Fourteenth Judicial Day.

6033.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,

vs.

STATE OF OKLAHOMA et al., Defendants in Error.

And now on this day it is ordered by the court that the stipulation for the substitution of parties, be, and the same is hereby approved, as per Journal Entry, filed in said cause, which said Journal Entry, is in words and figures as follows, to-wit:

"By stipulation of the parties it is ordered that R. L. Williams, the present Governor of the State of Oklahoma be substituted in the place and stead of Lee Cruce, former Governor; that J. L. Lyon, the present Secretary of State be substituted in the place and stead of Benjamin F. Harrison former Secretary of State; that E. B. Howard, the present Auditor of the State of Oklahoma be substituted in the place of J. C. McClelland, former Auditor of the State of Oklahoma; that Frank Gault, the present president of the Board of Agriculture be substituted for G. T. Bryan, former president of the Board of Agriculture.

J. F. SHARP,
Chief Justice."

* * * * * * *

97 In the Supreme Court of the United States.

No. —.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

vs.

STATE OF OKLAHOMA et al., Defendants in Error.

Designation of Points Relied on and Parts of the Record to Be Printed.

The plaintiff in error says that the points upon which it intends to rely in this court are that the Superior Court of Oklahoma County, Oklahoma, erred in sustaining the demurrer of the defendants in error to the 3rd, 4th, 5th and 6th paragraphs of the answer of the plaintiff in error; that the Supreme Court erred in affirming said ruling of the district court and in rendering judgment against the plaintiff in error.

The parts of the record necessary for the consideration of the points relied on and which the plaintiff in error desires to have printed are as follows:

1. The return of the Clerk of the Supreme Court of Oklahoma to the writ of error.
2. The citation and service thereof. (Page 1.)
3. The petition for writ of error. (Page 2.)
4. The assignment of error. (Pages 3 to 5.)
5. The order allowing writ of error. (Page 6.)
6. The writ of error. (Page 9.)
7. The petition of defendants in error together with the Exhibits attached thereto. (Pages 15 to 26.)

98–99 8. The answer of the plaintiff in error. (Pages 28 to 33.)

9. The demurrer to the answer. (Pages 35 and 36.)
10. The order of the court sustaining the demurrer. (Pages 38 and 39.)
11. Final judgment. (Pages 65 to 67.)
12. The order of affirmance by the Supreme Court. (Page 98.)
13. The opinion of the Supreme Court. (Pages 84 to 93.)
14. Order substituting parties. (Page 95.)

The above statement of the points on which the plaintiff in error intends to rely is not intended as a substitute for the assignment of errors.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.

The defendants in error in the above entitled cause hereby acknowledge that service of the foregoing statement was made on them through their counsel, Ledbetter, Stuart & Bell, on this 15th day of November, 1917.

W. A. LEDBETTER,
H. L. STUART,
Attorneys for Defendants in Error.

100 In the Supreme Court of the United States.

No. —.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

vs.

STATE OF OKLAHOMA et al., Defendants in Error.

Designation of Stipulation Desired to be Printed in Record by Defendants in Error.

The defendants in error desire that the stipulation covering the substance of testimony on pages 41 to 60 of transcript hereto attached, marked Exhibit "A," and made a part hereof, be printed as a part of the record in this cause, the said stipulation to be printed immediately after the order of the Superior Court sustaining demurrers, which is sub-division No. 10 of the part of the record desired printed by the plaintiff in error, and immediately before the final judgment shown on pages 65 to 67 of said transcript, which is subdivision No. 11 of the part of the record desired printed by plaintiff in error.

W. A. LEDBETTER,
H. L. STUART,
Attorneys for Defendant- in Error.

LEDBETTER, STUART & BELL,
Of Counsel for Defendants in Error.

Plaintiff in the above entitled cause hereby acknowledges that service of the foregoing statement was made on it through its counsel, Ames, Chambers, Lowe & Richardson, on this the 17th day of November, 1917.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE &
RICHARDSON,
Of Counsel for Plaintiff in Error.

101 EXHIBIT A.

In the Supreme Court of the United States.

No. —.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff in Error,

vs.

STATE OF OKLAHOMA et al., Defendants in Error.

Stipulation.

It is stipulated by and between the plaintiff in error and the defendants in error that the duly certified trancript of the Clerk of the Supreme Court of Oklahoma herein shows the evidence introduced on the trial of this cause in the trial court where it originated, to-wit, the Superior Court of Oklahoma County, Oklahoma, said evidence commencing at page 41 and ending at page 60 of said transcript. That said evidence showed the deposit of Fifty Thousand Dollars of the permanent school fund of the State of Oklahoma by the Commissioners of the Land Office of the State of Oklahoma in the Columbia Bank & Trust Company in accordance with the provisions of the bond executed by plaintiff in error to said Commissioners of the Land Office herein sued on, prior to the 29th day of September, 1909; that on the 29th day of September, 1909, the Columbia Bank & Trust Company, principal on the bond herein sued on, was insolvent and on said September 29, 1909, was taken in possession and control by the Bank Commissioner of the State of Oklahoma by virtue of the banking laws of said state; that said Columbia Bank & Trust Company has never resumed business and has been insolvent at all times since September 29, 1909; that the assets of said Columbia Bank & Trust Company were insufficient to pay the claims of its general and unsecured depositors; that the claims of its general and unsecured depositors aggregated approximately Three Million Dollars; that its assets amounted in full to approximately Two Million Four Hundred Thousand Dollars; that in order to pay its general and unsecured depositors a large amount of money, being approximately Six Hundred Thousand
102 Dollars, had to be obtained and was obtained by the Bank Commissioner of the State of Oklahoma from the Depositors' Guaranty Fund of the State of Oklahoma, and was used by said Bank Commissioner in paying off the claims of said general and unsecured depositors of said Columbia Bank & Trust Company, which means those depositors who had no other security for the repayment of their deposits except the said Depositors' Guaranty Fund aforesaid; that demand was made for the payment by said Columbia Bank & Trust Company of said Fifty Thousand Dollars so deposited

after said Columbia Bank & Trust Company had been taken into charge by said Bank Commissioner and the payment of said Fifty Thousand Dollars was refused by said Bank Commissioner in charge of said Columbia Bank & Trust Company and that demand was made of plaintiff in error for the payment of said deposit prior to the institution of this suit in said Superior Court, which payment was refused by plaintiff in error

It is further stipulated, in order to save the expense of printing all of said evidence and at the request of defendants in error, that this stipulation be printed immediately after the printing of the order of the court sustaining the demurrer shown on pages 38 and 39 of said transcript and just before the final judgment of said Superior Court shown on pages 65 to 67 of said transcript.

Witness our hands on this the 19th day of November, 1917.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel for Plaintiff in Error.

W. A. LEDBETTER,
H. L. STUART,
Attorneys for Defendants in Error.

LEDBETTER, STUART & BELL,
Of Counsel for Defendants in Error.

103 [Endorsed:] No. —. In the Supreme Court of the United States. United States Fidelity & Guaranty Company, a Corporation, Plaintiff in Error, vs. State of Oklahoma, et al., Defendants in Error. Designation of stipulation desired to be printed in record by defendants in error. Ledbetter, Stuart & Bell, Attorneys.

Endorsed on cover: File No. 26,239. Oklahoma Supreme Court. Term No. 772. United States Fidelity and Guaranty Company, plaintiff in error, vs. The State of Oklahoma et al. Filed November 23d, 1917. File No. 26,239.

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The United States Fidelity & Guaranty Company executed a depository bond to protect the State of Oklahoma against loss by reason of a $50,000 deposit in the Columbia Bank & Trust Company. This bank failed on Sept. 29, 1909, and under the decision of the court the Guaranty Company is required to pay the entire loss, is denied the right to recover any part of this loss out of the assets of the bank, and is denied the right of contribution with the guaranty fund of the state. Our argument is that this decision gives effect to an act of March 6, 1913, which impairs the obligation of the contract, and that the statutes are so unreasonably construed as to deprive the Guaranty Company of its property without due process of law.

The First Proposition discussed is that the construction of the statutes is so palpably erroneous as to deprive the Guaranty Company of its property without due process of law 19

Under this general proposition the following points are noted:

a. This court will review the construction of a local statute by a state court which is so manifestly unreasonable that it amounts to a denial of due process of law.

United Surety Co. v. American Fruit Products Company 19
Southwestern Telephone Co. v. Danaher 20
O'Neil v. Northern Colorado Irrigation Co. 20

b. Section 323 of the Compiled Laws of 1909 is analyzed at 23-31

Herein it is shown that the deposit involved is a general deposit:

Bank of Blackwell v. Dean 24
Marine Bank v. Fulton Co. Bank 24
Nat'l Bank of the Republic v. Millard 24

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That Section 323 did not exclude this deposit from participating in the assets of the bank or in the guaranty fund. On the contrary, it provides specifically for the payment in full of all depositors 24

That the Guaranty Company could not have anticipated a discrimination against secured creditors because none is made by the statute, and in the absence of a statute prescribing a discrimination, the general rule is that secured creditors participate on the basis of their entire claim 26

Merrill v. Natl. Bank of Jacksonville 26
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c. Section 7943 does not operate to deprive this deposit of its right to participate in the assets of the bank or the Guaranty Company of the right of contribution as against the guaranty fund 31

Sections 323 and 7943 were passed by the same Legislature, are not in conflict with each other and both should be given effect 31

Frost v. Wenie 32
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Sections 323 and 7943 should both be given effect for the further reason that one was passed under the exercise of the police power and the other in the proprietary capacity of the state 32

Noble State Bank v. Haskell 32
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Section 7943 was not intended as a prop to the guaranty fund, because of the eleven securities which it provides ten of them are assets of the bank and therefore cannot protect the bank 33

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This is further evidenced by the fact that Section 7943 protects the deposit of the school fund in national banks as well as state banks 37

The legislative intent to protect this deposit by the guaranty fund is further evidenced by the fact that the act of 1907 excepted state deposits which were secured from the assessment for the guaranty fund; that the amendment of 1908 likewise excepted such deposits, while the amendment of 1909, which was in effect when this bond was executed, repeals these exceptions and requires the bank to pay an assessment to the guaranty fund on its secured deposits as well as its unsecured deposits 37-39

The Second General Proposition is that while the opinion of the Supreme Court of Oklahoma does not mention the act of March 6, 1913, it does give effect to that act, and that act impairs the obligation of the contract in this case 39

Under this general proposition the following points are noted:

a. The act of March 6, 1913, withdraws the protection of the guaranty fund from secured deposits 39

b. While this act is not mentioned in the opinion of the Supreme Court of Oklahoma, this Court will determine for itself, both whether a contract exists, and whether the opinion of the state court gives effect to that later act which impairs the contract.

McCullough v. Virginia 41
Carondelet Canal Co. v. Louisiana 44
Terre Haute & Indianapolis Railway Company v. Indiana 45
Louisiana Railway & Navigation Company v. New Orleans 45

c. The decision of the Supreme Court of Oklahoma in Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co. does not hold that this deposit could not participate in the assets of the bank and does not prevent this Court from construing the contract for itself 48-49

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The following Oklahoma Statutes are cited:

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In the Supreme Court of the United States

OCTOBER TERM, 1918.

United States Fidelity & Guaranty Company,
Plaintiff in Error,
vs.
State of Oklahoma et al.
Defendants in Error.

No. 308

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR

This is a writ of error to review the judgment of the Supreme Court of the State of Oklahoma, affirming a judgment in favor of the defendants in error against the plaintiff in error (168 Pac. 234; not officially reported).

This suit was brought in the Superior Court of Oklahoma County on Dec. 24, 1909, by the State and the Commissioners of the Land Office of the State against the Guaranty Company to recover $50,000 of state funds deposited in the Columbia

Bank & Trust Company and secured by a depository bond executed by the Guaranty Company. The Guaranty Company filed its answer, consisting of a general denial and a number of affirmative defenses. The plaintiffs demurred to the affirmative defenses, and this demurrer was sustained. The cause was then tried on the issues raised by the general denial, judgment was rendered for the plaintiffs on October 3, 1913; an appeal was prosecuted to the Supreme Court of Oklahoma, where the judgment was affirmed on Oct. 9, 1917, and the case brought here by writ of error.

The questions presented involve the rulings on these demurrers.

On the 18th day of May, 1909, the Columbia Bank & Trust Company was engaged in the banking business in Oklahoma City. On that day the plaintiffs deposited $50,000.00 of school funds in this bank, taking a depository bond executed by the Guaranty Company in the sum of $50,000.00 to secure this deposit, which is as follows:

"Know all men by these presents: That we, The Columbia Bank & Trust Company, a corporation, located at Oklahoma City, in the State of Oklahoma (hereinafter called the principal), as Principal, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, a corporation duly incorporated under the laws of the State

of Maryland (hereinafter called the Surety), as Surety, are held and firmly bound unto the State of Oklahoma (hereinafter called the Obligee, in the full sum of Fifty Thousand Dollars, to which payment, well and truly to be made, the said bodies corporate bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

"Signed, sealed and dated this 18th day of May, A. D. 1909.

"The condition of the foregoing obligation is such, That whereas the said Obligee has designated the said principal as a depository for the funds and moneys that shall come into the possession of the Commissioners of the Land Office of the State of Oklahoma, by virtue of the performance of the official duties of the said Commissioners of the Land Office, as provided by the laws of Oklahoma and Acts of Congress.

"Now, therefore, the condition of the above obligation is such that if the said principal shall, during the term beginning at 9 o'clock A. M. on the 18th day of May, A. D. 1909, and ending with the close of banking hours on the 17th day of May, A. D. 1910, well and faithfully perform the trust reposed in it by such designation, and shall promptly pay all funds and moneys so deposited with it, either on legal order or on the check or draft of the Commissioners of the Land Office of the State of Oklahoma, and shall well and truly indemnify the said Obligee from any and all losses which it may suffer or sustain during the period as aforesaid, by reason of the designation of said principal as such depository, aforesaid, then this obligation to be void, otherwise to remain in force and virtue.

"Provided, however, and this bond is issued by

the Surety on the following express conditions:

"First. That in the event of any default on the part of the Principal, written notice thereof, with a verified statement of the facts showing such default and the date thereof, shall within ten days after such default, be delivered to the Surety at its office, in Baltimore, Maryland.

"Second. That the Surety shall not be liable for any deposits made after such defaults.

"Third. That in the event of default on the part of the Principal, the Surety shall be liable hereunder for only such proportion of the total loss sustained by the Obligee, as the penalty of this bond shall bear to the total penalty of all bonds and securities furnished to the Obligee, and in no event shall the Surety be liable hereunder in excess of the penalty of this bond.

"Fourth. That in the event of loss, the Surety shall, before payment, have granted unto it by the Obligee, a full, complete and clear title by the assignment from the Obligee of such proportion of the Obligee's claim against said Principal as may be sustainable under the conditions and provisions of this bond.

"Fifth. No suit at law or in equity shall be sustainable under this bond unless commenced within ninety days from the date of expiration, cancellation, or default.

"Sixth. That the Surety shall have the right to terminate its suretyship, under this obligation, by serving notice of its election so to do upon said Obligee or its lawful representatives, and thereupon the Surety shall be discharged from any and all liability hereunder, for any default of the Principal, occurring after the expiration of fifteen days after service of such notice.

"Seventh. If the Surety so elect, this obligation may be continued for any subsequent period by continuation certificate signed by the Surety, by its president or vice-president, under seal, and attested by its Secretary or Assistant Secretary."

On September 29, 1909, the Columbia Bank & Trust Company was closed by the Bank Commissioner. Thereupon the plaintiff made demand upon the bank and upon the Guaranty Company, and, upon this demand being refused, suit was brought alleging the facts stated and praying for judgment against the Guaranty Company. The bank was not made a party. The third, fourth, fifth and sixth paragraphs of the answer are as follows:

"Third. For a further defense this defendant says that one of the express terms and conditions of the bond sued on, was,

" 'That in the event of default on the part of the principal, the surety shall be liable hereunder for only such proportion of the total loss sustained by the obligee, as the penalty of this bond bears to the total penalty of all bonds and securities furnished to the obligee, and in no event shall the surety be liable hereunder in excess of the penalty of the bond,'

and the defendant says that under the laws of the State of Oklahoma then in force there was what was known as the guaranty fund created by assessments upon all of the banks and trust companies doing business in the State. That the purpose of said

fund was to protect all depositors in such banks and trust companies against loss by reason of the failure of any one of such institution. That a large sum of money was in the possession of the custodian of said guaranty fund, and that of this sum of money the said Columbia Bank & Trust Company, principal in said bond, had paid its full proportion based on its deposits, and that its deposits account was more than twice as large as the deposit account of any other state bank or trust company in the State of Oklahoma, and that that fund theretofore had been created by the contributions of the various institutions subject to the law and in large part by the assessments paid by the Columbia Bank & Trust Company.

"Defendant further says that said guaranty fund was a security furnished to the obligee in the bond sued on as well as to all other depositors in said bank and was co-extensive with and equal to the obligation of this defendant, and that therefore this defendant was not at the time of the failure of the Columbia Bank & Trust Company liable to this plaintiff for more than 50 per cent of the loss sustained by the plaintiff on account of the default of the said Columbia Bank & Trust Company, and the defendant further alleges and states that the assets of the said Columbia Bank & Trust Company were equal to 80 per cent of its liability to depositors and creditors, and that such assets came into the possession of the plaintiffs, and were received by said plaintiffs, and that therefore the total liability of this defendant on said bond at that time did not

exceed 10 per cent of the face value of the bond.

"Fourth. For a further defense the defendant says that one of the express terms and conditions upon which said bond was issued was: 'That in the event of loss, the surety shall, before payment, have granted unto it by the obligee, a full, complete and clear title by the assignment from the obligee of such proportion of the obligee's claim against said principal as may be sustainable under the conditions and provisions of this bond,' and defendant says that said Columbia Bank & Trust Company failed on September 29, 1909; that immediately thereafter the plaintiff, the State of Oklahoma, took possesion of said bank and all of its assets; said possession being taken by the State through its bank commissioners and its banking board, and that immediately thereafter this defendant demanded of the said plaintiffs, through its said officers aforesaid, that the assets of said bank in their possession and under their control be applied to the payment of the said debt, but the said plantiffs through its said officers then refused to do so and has never conveyed to the defendant a full, complete and clear title by an assignment of its claim against the said Columbia Bank & Trust Company as required by the provisions of the bond sued on herein set out, but that the plaintiff and all of its officers have at all times failed and refused to assign said claim or any part thereof to this defendant, and that therefore the plaintiffs are not entitled to recover in this action.

"Fifth. For a further defense the defendant says that the plaintiffs through its bank commissioner and the banking board of the State on Sept. 29, 1909, took possession of the said Columbia Bank & Trust Company, claiming that it was insolvent. That they at once proceeded to pay off the claims of depositors out of the assets of the said bank and out of the depositors' guaranty fund

of the State of Oklahoma, which was in their possession and subject to their control. That the deposits of said bank aggregate the sum of, to-wit, $3,000,000; that the assets of said bank aggregate the sum of, to-wit, $2,400,000.00, and that therefore the assets of said bank were sufficient to and did pay 80 per cent of the deposits. That the said plaintiffs through its said bank commissioner and banking board used a large sum of money, to-wit, $600,000.00, out of the depositors' guaranty fund of the State of Oklahoma with which to pay the remaining claims of depositors, and defendant says that by reason of the facts herein stated the claim of the plaintiffs on account of this $50,000.00 deposit herein sued for has been paid to the full extent of 80 per cent out of the assets of said bank and that the remaining 20 per cent constitutes the loss on account of said bond, for which this defendant is liable for one-half, and that the remaining one-half therefore has been paid by reason of the facts and circumstances herein set forth out of the said depositors' guaranty fund, and that this defendant remains liable only for the sum of $5,000.00, which it is ready and willing to pay.

"Sixth. For a further defense the defendant says that at the time of the transactions complained of the commissioners of the land office of the State of Oklahoma consisted of the Governor, the Auditor, president of the Board of Agriculture, Secretary of State, and Superintendent of Public Instruction, while the banking board of the State consisted of the Governor, the Auditor, the president of the Board of Agriculture, the Lieutenant Governor and the State Treasurer; so that the Governor, the Auditor, and the president of the Board of Agriculture composed a majority and a quorum of both boards. And that when said Columbia Bank & Trust Company failed on September 29, 1909, Hon. C. N. Haskell was governor

of the State of Oklahoma and chairman of the State Banking Board and chairman of the Commissioners of the Land Office; that he was the dominating factor on both boards and that he took personal control of the affairs of the said Columbia Bank & Trust Company, actively directing the management thereof. That the bank commissioner was an appointee of the said Governor, and that pursuant to the Governor's directions the bank commissioner took possession of the bank and all of its affairs and assets and received such sums out of the depositor's guaranty fund as were necessary to pay off the depositors of said bank. That notwithstanding the fact that the assets of said bank were sufficient to pay 80 per cent of its depositors and that the guaranty fund was sufficient to pay the remaining 10 per cent, the said commisisoners of the land office and the banking board and the said bank commissioner, all acting under the authority and control of the said Governor, refused to apply the fund in the possession of the State to the payment of the deposit of the State, but demanded payment in full from this defendant. That this defendant declined to pay the full amount of said loss, but demanded that the assets of said bank be applied to the payment of other depositors and that the deficit be paid out of the guaranty fund. That the said banking board and the bank commissioner refused to make this payment, and the said commissioners of the land office refused to demand it. Whereupon this defendant filed a motion in the district court of Oklahoma County wherein the said administration of the affairs of said bank was pending, to require the bank commissioner to pay these plaintiffs and to enjoin it from paying out all of the resources of said bank and the guaranty fund to the exclusion of the deposit of these plaintiffs, and said district—sustained the motion of this

defendant, but its order was reversed by the Supreme Court of the State of Oklahoma.

"The defendant further says that if it be true that the deposit of the State of Oklahoma secured by the bond sued on is still unpaid, that it has been discharged from further liability thereon by the misconduct and neglect of the plaintiffs, acting through its officers as aforesaid. And defendant further says that by reason of the facts and circumstances herein stated, it was never liable to the plaintiffs for more than $5,000.00, and that if section 323 of the Compiled Laws of 1909 (Session Laws 1907 and 1908, Chapter 6, Article 2, Section 6, page 141) is construed as denying the plaintiff and this defendant the right to participate pro rata in the assets of the Columbia Bank & Trust Company; that said section is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it takes from this plaintiff and from his defendant their property without due process of law and denies to them the equal protection of the law, and that it is further in conflict with Section 10 of Article 1 of the Constitution, in that it is a law impairing the obligation of contracts. And defendant further says that the said Columbia Bank & Trust Company paid into the guaranty fund its regular assessments and thereby acquired the right to have its depositors paid out of said fund, and that if the Act of the Legislature creating the depositors' guaranty fund, being Article 2 of Chapter 6 of the Session Laws of 1907-1908, which includes the above named section, is so construed as to deprive the plaintiff in this case of all right to participate in said guaranty fund and to deprive the defendant of its right to pro rate the loss with said guaranty fund; that said Act of the Legislature is in conflict with the Fourteenth Amendment of the Constitution and with Section 10 of Article 1 of the Constitution

of the United States, in that it takes the property of the said Columbia Bank & Trust Company, and of the plaintiffs and of the defendants without due process of law and impairs the obligation of the contract between this defendant and the said Columbia Bank & Trust Company and the imposed contract between the Columbia Bank and Trust Company and the other banks subject to the guaranty law and the depositors therein."

Demurrers were filed to each of these paragraphs, sustained by the trial court, and this ruling was affirmed in the Supreme Court.

ASSIGNMENT OF ERRORS

1. The Supreme Court of the State of Oklahoma committed error in affirming the judgment of the District Court of Oklahoma County, Oklahoma, in said cause.

2. The Supreme Court of the State of Oklahoma erred in holding that Section 323 of the Compiled Laws of 1909 (Session Laws 1907 and 1908, Chapter 6, Article 2, Section 6, page 141) as construed by it does not conflict with the Fourteenth Amendment of the Constitution of the United States by depriving plaintiff in error of its property without due process of law, and denying to it the equal protection of the laws and in refusing to hold that said section is in conflict with Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of contracts.

3. The Supreme Court of Oklahoma erred in holding that the Act of the Legislature creating the Depositors' Guaranty Fund, being Article 2 of Chapter 6 of the Session Laws of 1907 and 1908 as construed by it was not in conflict with the Fourteenth Amendment of the Constitution and with Section 10 of Article 1 of the Constitution of the United States by the taking of the property of the Columbia Bank & Trust Company, and this plaintiff in error and of the defendants in error, without due process of law, and impairing the obligation of the contract between this plaintiff in error and the said Columbia Bank & Trust Company.

4. The Supreme Court of Oklahoma erred in holding that Section 9 of Article 22 of the Session Laws of 1913 (pages 31 and 32) does not conflict with Section 10 of Article 1 of the Constitution

of the United States by impairing the obligation of the contract between the plaintiff in error and the defendants in error and the Columbia Bank & Trust Company.

5. The Supreme Court of the State of Oklahoma erred in holding that Sections 323 and 7943 of the Compiled Laws of 1909 construed in connection with Section 9 of Chapter 22 of the Session Laws of 1913 do not violate the Fourteenth Amendment of the Constitution of the United States and Section 10 of Article 1, by taking the property of the plaintiff in error without due process of law, and by denying to them the equal protection of the law and by impairing the obligation of the contract between the plaintiff in error and the defendants in error and the Columbia Bank & Trust Company.

6. The Supreme Court of Oklahoma erred in holding that the plaintiff in error and the defendants in error upon the failure of the Columbia Bank & Trust Company were not entitled to participate in the assets of the said Columbia Bank & Trust Company.

ARGUMENT.

The effect of the decision of the Supreme Court of the State is to subject the Guaranty Company to a total loss of the entire penalty of the bond, to deprive it, as well as the school fund of the State, of all right to participate in the assets of the bank, notwithstanding the fact that the assets of the bank are sufficient to pay 80 per cent of the claims of its depositors. We maintain that this decision gives effect to an Act of March 6, 1913, providing that no deposit in a state bank which is otherwise secured shall be paid out of the depositors' guaranty fund, and thereby impairs the obligation of the contract evidenced by the depository bond.

Our position is that under this bond and the statutes in force at the time it was executed a contract was created between the State, the Columbia Bank & Trust Company, and the United States Fidelity & Guaranty Company, pursuant to which the Guaranty Company was liable to the State for such loss as it might sustain by reason of the failure of the Trust Company; that the Guaranty Company was entitled to exoneration from the Trust Company and to contribution from the guaranty fund; and that this contract was impaired by the Act of March 6, 1913. We further contend

that even though the Act of March 6, 1913, did not impair the obligation of the contract, still the decision of the court places a liability upon the Guaranty Company which involves such an unreasonable interpretation of the statutes as to amount to a taking of property without due process of law and in violation of the Fourteenth Amendment. The two propositions are very closely related, although it is possible to decide either one adversely to us and the other in our favor. Both propositions, of course, involve a correct interpretation of the statutes, because under its repeated decisions, this Court will determine for itself the proper interpretation of the contract, this being necessary as a preliminary to a determination as to whether the contract has been impaired. In determining that the Act of March 6, 1913, impaired the obligation of the contract, it is only necessary for this Court to decide that the Supreme Court of the state erred in its interpretation of the statutes. The Court would have to go a step further, however, to decide that the decision in itself is a deprivation of property without due process of law, because, to reach this conclusion, as we understand the rule, this Court must not only hold that the Supreme Court erred in its interpretation, but that this error was due to a perverse or unreasonable interpretation of the statutes.

The pertinent sections of the law in force at the time the bond was executed are Sections 323 and 7943 of the Compiled Laws of 1909, and Sections 1061 and 1062 of the Revised Laws of 1910. Those sections are as follows:

Sec. 323. "In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available for that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section two (320), the amount necessary to make up the deficiency, and the State shall have, for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations, or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

Sec. 7943. "Until such time as said funds may be safely and advantageously invested in the securities mentioned in the preceding section, said commissioners of the land office shall be and they are hereby authorized and empowered to deposit said sums in such banks or trust companies as they may select, but shall in every case take as security for such deposits the following classes of securities and no others:

Bonds of the State of Oklahoma, bonds of the counties, school districts, cities and towns of this State, State and county warrants and approved State, county and municipal bonds of other States, bonds of the United States, first mortgages on real estate, warrants or other legal evidence of indebtedness authorized by law to be issued by municipalities in payment of paving, sewer, waterworks, electric light, or other public indebtedness and for which a special tax is authorized to be levied and collected for the payment thereof, and surety company bonds, and as additional security on any deposit which said board may make, the said commissioners of the land office shall have authority to accept surety companies or trust companies as sureties, but in each case said Board of Land Commissioners shall accurately investigate the value of securities offered for such deposits, *provided, however,* such surety company or trust company shall neither be in any manner interested directly or indirectly in any bank or trust company for which it becomes additional surety; nor shall any surety, bonding or trust company be accepted as additional surety that has more than one-fourth of its paid capital invested in bank stock. The said Board of Land Commissioners may whenever they deem it advisable require additional securities after a deposit is made as they deem necessary to secure the safety of the deposit."

1061. "A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such."

1062. "A surety is entitled to the benefit of every security for the performance of the principal obligation, held by the creditor or by a cosurety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

It will be noted that by the language of the bond itself the right of contribution and the right of exoneration are both recognized. These, of course, are equitable rights that would exist without being specifically named in the contract, but in this case they are specifically named and became a part of the contract. It will also be noted that Sections 1061 and 1062 also specifically recognize the right of exoneration and the right of contribution. Supporting our right therefore, we have the general doctrines of equity, the specific provisions of the bond, and the express language of the statutes. We believe that there is nothing in Sections 323 and 7943 that can be reasonably construed as denying either one of these rights or as granting a preference to the guaranty fund in all the assets of the bank or protecting it from the general doctrine of contribution.

The Act of March 6, 1913 (Session Laws, 1913, pp. 31-32), provides:

Sec. 9. "No deposit in a state bank, other-

> wise secured, shall be protected by, or paid out of, the Depositors' Guaranty Fund created under the laws of the State of Oklahoma, nor included in the computation of average daily deposits as a basis for assessments. No deposit in any state bank, on which a greater rate of interest is allowed or paid, either directly or indirectly, than is permitted by the rules of of the Bank Commissioner, shall participate in the benefits of the Guaranty Fund."

This is the first statutory provision which undertakes to exclude a secured deposit from the protection of the guaranty fund or to secure the guaranty fund from the equitable and statutory duty of contribution.

In discussing the subject we will take up, first, the proposition that the decision of the court is so unreasonable as to violate the Fourteenth Amendment; and, second, the proposition that the Act of March 6, 1913, impairs the obligation of the contract. All that we say under the first division, however, is applicable to the second, but it may make our position clearer to discuss them separately.

FIRST.

The construction of the statutes by the Supreme Court of Oklahoma is so unreasonable as to amount to a denial of due process of law and the equal protection of the law, in violation of the Fourteenth Amendment.

The rule which we invoke is announced by this Court in *United Surety Company* v. *Ameri-*

can Fruit Products Company, 238 U. S. 140-142; *Southwestern Telephone Company* v. *Danaher,* 238 U. S. 482-489, and *O'Neil* v. *Northern Colorado Irrigation Co.,* 242 U. S. 20-26. In the United Surety Company case it is intimated at page 142 that this Court would review the construction of a local statute by a local court, if it was " * * * so manifestly absurd as to extend the surety's liability in a way that could not have been foreseen. * * *"

In the O'Neil case, 242 U. S., at page 26, it is intimated that a construction of a statute by a state court reached by "* * * a perverse reading of the law * * *" would be reviewed in this court in order to protect rights of property.

In the Danaher case this court reviewed the decision of the Supreme Court of Arkansas, construing an Arkansas statute, reached a different conclusion and reversed the cause. At page 489 this language is used:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve."

We respectfully urge that the decision of the

Supreme Court of Oklahoma construing the statutes involved in this case comes within the rule laid down in these quotations. It will be remembered that the state made a deposit in the Columbia Bank & Trust Company taking to protect it against loss the bond sued on. This was an ordinary deposit subject to check. The condition of the bond was that if the trust company "shall promptly pay all funds and moneys so deposited with it, either on legal order or on the check or draft of the Commissioners of the Land Office of the State of Oklahoma, and shall well and truly indemnify the said Obligee from any and all losses which it may suffer or sustain during the period as aforesaid, by reason of the designation of said principal as such depository aforesaid then this obligation to be void."

The decision is that, under Sections 7943 and 323 of the Compiled Laws of 1909, deposits secured by a bond cannot participate in the Guaranty Fund and cannot participate in the assets of the bank until the Guaranty Fund has been repaid in full. As the Guaranty Fund is only called upon to pay the losses to depositors by reason of the bank's failure, it is obvious that any depositor whose right to share in the assets is postponed to the reimburse-

ment of the Guaranty Fund is denied the right entirely. Sections 323 and 7943 have been heretofore quoted.

Our position is that these sections do not deprive this deposit of its right to participate in either the guaranty fund or in the assets of the bank, and that the decision of the court construing these sections as denying that right is such an unreasonable construction that it deprives the surety company of its property without due process of law and denies to it the equal protection of the law.

These statutes were in force when the bond was executed, and therefore the surety company was bound to take notice of their meaning. It construed them as meaning that the deposit covered by its bond was entitled to share ratably in the assets of the bank, and that under the terms of the bond itself the loss after thus distributing the assets was to be borne ratably by the guaranty fund and the surety company. It made the contract subject to a construction to be placed upon the statutes at some time in the future, but it was a part of the obligation that the statutes should not be perversely or arbitrarily construed as imposing upon it a liability which could not be anticipated.

Let us assume in the first place that this deposit was made and this bond executed without

either Section 323 or Section 7943 being in existence. What would have been the rights of the parties upon the failure of the bank? The assets of the bank would have been ratably distributed amongst its creditors and the loss to the state would have been borne by the Guaranty Company. If the Guaranty Company had been called upon for payment before the distribution of the bank's assets it would have been subrogated to the right of the state to participate in those assets. These are mere statements of elementary law and need not be supported by authorities.

Section 323 was passed before Section 7943, and our next inquiry is whether this right of the Guaranty Company to participate in the assets of the bank was taken away by Section 323. Section 323 is a part of the bank guaranty law and we quote in the appendix, Sections 320, 321, 322, 323, and 324, so that the court may get the general scope of that legislation.

Section 320 creates the guaranty fund and levies an assessment against each bank based on its average daily deposits. This assessment is computed on all the deposits and not only on unsecured deposits. The identical deposit here involved therefore entered into the basis on which this Trust

Company was assessed for the creation of the guaranty fund. In 1913 secured deposits were excluded in making the assessment for the guaranty fund, but when this bond was executed the Columbia Bank & Trust Company was subject to assessment on this very deposit to help create the guaranty fund.

Bearing in mind the general rule of law which would have obtained in the absence of any statute, and bearing in mind that the law creating the guaranty fund required this Trust Company to contribute to the guaranty fund on the basis of this deposit, could the Guaranty Company anticipate that this statute would be construed as denying this deposit not only the right to participate in the guaranty fund (to which the bank was required to contribute on account of this deposit), but likewise the right to participate in the assets of the bank?

The deposit, of course, being subject to check, was a mere general deposit and not a special deposit.

Bank of Blackwell v. *Dean*, 9 Okla. 626.
Marine Bank v. *Fulton Co. Bank*, 2 Wall. 252, 256.
Nat. Bank of the Republic v. *Millard*, 10 Wall. 152, 158.

Being a deposit, did Section 323 exclude it from consideration? It, of course, must be borne in mind

that the purpose of the guaranty fund is to pay depositors. Section 323 provides specifically that when the bank commissioner takes possession of a bank "the depositors of said bank or trust company shall be paid in full." It likewise provides that "when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the depositors' guaranty fund * * * the amount necessary to make up the deficiency. This language requires the payment of depositors, and this duty is expressed in as clear language as it is possible to use. True—a lien on the assets of the bank is given to the state for the benefit of the depositors' guaranty fund, but this lien does not attach against depositors, because the statute commands that depositors be paid. This lien might attach against other creditors; in fact, the Supreme Court has so held, but if it attaches against depositors, then the depositors' guaranty law merely works in a circle and depositors would never be paid, because the first charge against the assets of the bank would be the reimbursement of the guaranty fund. If the guaranty fund is put into one window of the bank and withdrawn through the other, it is a mere farce. We did not construe this statute as having that effect.

Nor can it be said that we should have anticipated a distinction between secured and unsecured depositors. At common law there is no such distinction. On the contrary, the general common law rule in the administration of insolvent estates, is that a secured creditor proves his claim for the full face value. That he can dispose of his collateral, apply the entire proceeds as a credit on his claim, and still continue to participate in the other assets of the bank on the basis of the full face of his claim.

Merrill v. *Nat. Bank of Jacksonville,* 173 U. S. 131.
Chemical Nat. Bank v. *Armstrong,* 59 Fed. 372, 65 Fed. 573, 28 L. R. A. 231 and cases cited.
Cabot v. *Bodman,* 11 Gray 134.
Bank v. *Haug* (Mich.), 47 N. W. 33.
People v. *Remington,* 121 N. Y. 328, 24 N. E. 793.
Kauffman v. *Hudson,* 65 Tex. 716.
Detroit Trust Co. v. *State Bank* (Mich.), 114 N. W. 327.
Bank v. *Flippen,* 158 N. C. 334, 74 S. E. 100 and cases cited.
Boney v. *Stevenson* (N. C.), 77 S. E. 676.

In *Merrill* v. *Natl. Bank of Jacksonville,* 173 U. S. 131, on pages 140 and 141, it is said:

"Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor who has given collateral security, re-

mains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis* v. *United States*, 92 U. S. 618, 623, it was ruled that: 'It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor.'

"Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment, but as under the equity rule, the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on collateral, cannot operate to change the relations between the creditor and his co-creditors in respect to their rights in the fund.

"As Judge Taft points out, it is because of the distinction between the right *in personam* and the right *in rem* that interest is only added up to the date of insolvency, although after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

"*In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not.* Of course, he cannot go beyond payment, and surplus assets or so much of his

dividends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted, as far as possible, to the right of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

> *"The contractual relations between borrower and lender, pledging collateral, remain, as is said by the New York Court of Appeals in People* v. *Remington,* 121 N. Y. 328, 336, *'unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement.' The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part, and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken."*

In *Chemical Nat. Bank* v. *Armstrong,* Judge Taft, after pointing out that the suspension of the bank by operation of law transfers the title to the assets to the receiver, and that it necessarily stops execution, says at page 234 of the 28th L. R. A.:

> *"The right which a creditor of a bank had before suspension, of levying an execution to satisfy his judgment, is gone and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt,* which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed. We see no reason why this does not apply as well to creditors who hold collateral as to those who are unsecured.

It is well settled that the holding of collateral does not prevent a creditor from enforcing his claim in the ordinary way by judgment and execution against a debtor without any deduction for his collaterals. *Lewis* v. *United States,* 92 U. S. 618, 23 L. Ed. 513.

"When the secured creditor is required by the transfer of the assets in trust for winding up purposes, to forego his right to satisfy his entire debt out of the property of the bank by levy and execution, why should there be substituted for that right anything less than that which the unsecured creditor gains by yielding up the same right? Take the case of two creditors of the bank for $1000 each, one with collateral and the other unsecured. Before suspension, the one has two modes of collecting his debt—first, by levy and execution for $1000; and, second, by reducing and applying the collateral. The other has but one—that of a levy and execution for $1000. When the bank suspends, the unsecured creditor acquires, in exchange for his right to levy on the property of the bank to make $1000, an undivided interest in the assets held by the receiver, after the circulating notes are paid, which bears the same ratio to the entire assets of the bank as $1000 does to the entire indebtedness. If so, why should not the secured creditor who, before the suspension, had also the right to make $1000 by levy on the property of the bank, receive the same ratable interest in the assets held by the receiver? The suspension of the bank, and its seizure by order of the comptroller, have no effect to change the rights of the creditor with reference to his collateral. He enjoys precisely the same advantage over the unsecured creditor, with respect to the collateral, that he did

secure. The true rule with reference to the construction of statutes is stated by this court in *Frost* v. *Wenie*, 157 U. S. 46. The syllabus in that case says:

> "Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both."

See also *United States* v. *Haley*, 160 U. S. 136-147. The Supreme Court of Oklahoma, in *Hunter* v. *State*, 154 Pac. 545, says:

> "Where statutes relating to the same subject-matter have been enacted at the same legislative session, they should be construed together, as in *pari materia*, so that effect may be given to each, rather than to infer that one of such statutes was meant to destroy the other."

There is another reason why both of these protections should be thrown around the school fund. Section 323 was passed by the state under the exercise of the police power, *Noble State Bank* v. *Haskell*, 219 U. S. 104, 575. Section 7943 was passed by the state acting in its proprietary capacity as the owner of the school fund. In this capacity the state acted more as an owner than as a government. *Safety, etc., Company* v. *Baltimore*, 66 Fed. 140.

Acting in its proprietary capacity and somewhat as a private corporation, it is even more ap-

parent that the two sections should be construed so as to give full effect to both. To hold that the assets of the bank are not liable, that the guaranty fund is not liable, and that the surety company only is liable, might subject the state to the loss of the entire fund if it should happen that a surety should become insolvent. It is possible to hold that the surety company and the guaranty fund are co-insurers, but to discharge the bank and the guaranty fund both, is a result that we did not anticipate. If we had we would not have made the bond.

The court says in one of its opinions that Section 7943 was intended as a prop to the guaranty fund, but it is demonstrable that this is not true. It will be noted that the school funds may be deposited in banks upon taking the specified "securities and no others." They are, first, bonds of the state; second, county bonds; third, school district bonds; fourth, city bonds; fifth, state warrants; sixth, county warrants; seventh, municipal bonds of other states; eighth, bonds of the United States; ninth, first mortgages on real estate; tenth, street improvement certificates; eleventh, surety company bonds.

The language applicable to surety company bonds is as follows:

"And as additional security on any deposit which the said board may make, the said commissioners of the land office shall have authority to accept surety companies or trust companies as sureties."

Note the words "additional security." Additional to what? Manifestly to the liability of the trust company or bank and every other security that the state has. Suppose in this case the plaintiffs had taken farm mortgages of the value of $40,000.00 and the bond of this defendant as "additional security." What would have been the rights of the parties? Plainly the plaintiffs would have had the right to sell the farm mortgages and call upon this defendant for the balance. It is equally plain that this defendant, if it had been called upon for the full amount of its bond, would have been subrogated to the rights of the plaintiffs to the farm mortgages. The same questions might be asked as to each of the other ten classes of securities and the same answers would follow. In each one of the cases, therefore, the assets of the Trust Company would have paid eighty per cent of the deposit, and this company, on its bond given as additional security, would only have been liable for the remaining 20 per cent. These questions and answers merely illustratrate the proposition that the claim of the plaintiffs is primarily a claim against the Trust

Company, and not against its surety, and Section 7943 does not relieve the Trust Company of liability, or deprive the plaintiffs of their claim against its assets. In fact, of the *eleven* securities named in Section 7943, *ten* of them are plainly assets of the Trust Company, and therefore 10-11ths of the section cannot be construed as relieving the Trust Company of liability or preserving its assets for the lien of the guaranty fund. In construing the statute, the 1-11th must be construed in the same way as the other 10-11ths.

If the security furnished by a surety company bond is, as specifically stated in the section, "additional security," then it must be additional to something else. The word "additional" contemplates something preceding. Some security to which this liability of the surety company is to be added. If it be held that the Trust Company, as soon as it becomes insolvent, thereupon ceases to be liable to the state, manifestly the surety company's liability is not an *additional* liability at all, but the only liability.

That there remains a liability of the trust company which can be realized when the guaranty fund has been repaid in full, is merely a form of words possessing no substance. This could not happen in

the case of an insolvent bank. If the bank were to pay all its creditors, including the guaranty fund, manifestly it would be solvent. Therefore, it is correct to say that the fact of insolvency discharges the trust company from all liability to any depositor who has taken security.

Suppose the state in this case had as security first mortgages on farms and the loans had been badly made, or that disasters had happened to the particular land, such as floods or other catastrophies, and thereby the security had been impaired fifty per cent. If the opinion of the Court is correct, the state would lose fifty per cent of its school funds, all because it had sought to throw an "additional" safeguard around them. It is not held that the state loses its right to participate in the assets of the bank by having *adequate* security, but by having *any* security, however inadequate.

Any one of the eleven classes of security named in Section 7943 might prove insufficient. The bonds or warrants might be adjudged illegal, or the municipality might default. These things may not happen, but we know they do happen sometimes, and yet under this opinion the state, because it has made an effort to secure *additional* security, has lost its original security.

If there was no guaranty fund to protect depositors, and if there was no Section 7943 to furnish special security for the school fund, the state would participate *pro rata* in the assets of any insolvent bank used as a depository. Are the state's rights less by reason of these two statutes intended by the legislature to provide additional protection?

Another consideration convinces that the opinion of the Oklahoma court is untenable. Section 7943 relates to the deposit of the school funds in any bank and not merely in a state bank. It applies likewise to national banks, while Section 323 does not. If the state's money had been deposited in a national bank, would Section 7943 have deprived the state of the right to participate pro rata in the assets of the national bank? The decision in *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, and the other cases elsewhere cited and quoted from in this brief demonstrate that this question must be answered in the negative. If this is true, then why should the section have a different effect when applied to state banks?

We call attention to another reason why it could not have been anticipated when this bond was executed that the courts could hold that the deposit secured by the bond could not participate in either the guaranty fund or the assets of the bank. The

guaranty fund was first created by an act approved December 17, 1907. Section two of which provides (Session Laws 1907-8, page 146):

> "Within sixty days after the passage and approval of this act, the State Banking Board shall levy against the capital stock an assessment of one per cent of the bank's daily average deposits, *less the deposits of the State funds properly secured,* for the preceding year, upon each and every bank organized and existing under the laws of this State, for the purpose of creating a depositors' guaranty fund."

This section was amended by an act approved May 26, 1908, which provides (Session Laws 1907-8, page 139):

> "The State Banking Board shall levy against the capital stock an assessment of one per cent of the bank's daily average deposits, *less the deposits of the United States, and State funds, if otherwise secured,* for the preceding year, upon each and every bank and trust company organized or existing under the laws of this State, for the purpose of creating a depositors' guaranty fund."

It will be noted that by the first act no assessment was levied against state funds properly secured, and by the second act no assessment was levied against either state funds or United States funds if otherwise secured. While those sections were in force there was room for argument that

the guaranty fund did not apply to the protection of state or United States funds when secured. At the time this bond was executed, however, the act of 1909 was in effect. This act took effect on March 11, 1909 (Session Laws 1909, page 122). This is Section 320 of the Compiled Laws of 1909, set out in full in the appendix.

It will be observed from this section that the assessment is upon all the deposits, and that State and United States deposits properly secured are not mentioned or excepted. Having excepted these deposits originally and having withdrawn the exception before this bond was executed, it seems still clearer that the construction adopted by the court is unreasonable and could not have been anticipated.

SECOND.

While the opinion of the Supreme Court does not mention the Act of 1913, it gives effect to that Act as applied to existing contracts. This Act violates Section Ten of Article One of the Constitution, and is therefore void, as impairing the obligation of the contract made in this case.

On March 6, 1913, the following Act of the Legislature took effect (Section 9 of Chapter 22, of the Session Laws 1913, pages 31-32):

> "No deposit in a state bank, otherwise secured, shall be protected by, or paid out of, the Depositors' Guaranty Fund created under the

laws of the State of Oklahoma, nor included in the computation of average daily deposits as a basis for assessments. No deposit in any state bank, on which a greater rate of interest is allowed or paid, either directly or indirectly, than is permitted by the rules of the Bank Commissioner, shall participate in the benefits of the Guaranty Fund."

This act withdraws the protection of the guaranty fund from secured deposits, but at the same time it relieves the bank from payment of assessments based on secured deposits, so that there is a measure of justice in it as a prospective act. Under the decisions of the Supreme Court of the State, however, the deposit here involved is excluded from the protection of the guaranty fund, notwithstanding the fact that it was included in the basis of payments by the bank into the guaranty fund. The Supreme Court of the State in deciding this case does not refer to this act of 1913. It bases its decision upon a construction of Sections 323 and 7943, but notwithstanding that fact it seems to us inevitable that this court will conclude that their decision does give effect to this act and that this act as applied to past transactions impairs the obligation of the contract.

The fact that the State Supreme Court does not specifically refer to the later act does not preclude

this court from saying that the later act must have been the basis of its decision. In *McCullough* v. *Virginia*, 172 U. S. 102, the question was whether the Supreme Court of Virginia had given effect to a subsequent statute impairing the obligation of contracts. The court had not based its decision on the subsequent statute, but had held specifically that the act of 1871 was void. It, of course, followed from this holding that subsequent legislation could not have impaired a contract based upon the act of 1871. Notwithstanding this, however, this court held that the necessary effect of the decision was to give effect to the subsequent legislation and that therefore it was the subsequent legislation which impaired the contract, and this Court refused to follow the State Supreme Court in construing the act of 1871. On page 109 it is said:

> "Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, in which the court,

speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 145 *Wright* v. *Nagle*, 101 U. S. 791, 793; *McGahey* v. *Virginia*, 135 U. S. 664, 667, in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is,

whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.' See also *Douglas* v. *Kentucky*, 168 U. S. 488, 501, and cases cited therein."

At page 116 it is again said:

"It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision."

And again on page 117:

"In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to

set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made."

The same point is ruled in *Carondelet Canal Co.* v. *Louisiana,* 232 U. S. 362, where the Supreme Court of the State had based its decision on early legislation and did not refer to a later statute. It was held that this fact did not prevent this Court from considering the later statute, and if it found that it was an essential, although an unmentioned, element of the decision, the Federal question must be determined. On pages 375 and 376 it is said:

"The State, as we have said, made a motion to dismiss on two grounds, one of which we have decided; the other is that no Federal question is presented by the record, the canal company failing to distinguish, it is contended, between a subsequent act of the legislature impairing the contract and the decision of the court construing it. The question then is whether the act of 1906, appointing the Board of Control and investing it with powers, was an act which impaired the obligation of the contract, and in the solution of the question we must assume that the act of 1858 constituted a contract between the State and the canal company. The negative of the question is urged by the Attorney General in an argument of strength, in which he contends the court did not consider or give any effect to the act of 1906, but considered only the act of 1858, and decided that the canal company did not acquire the rights under it which the company con-

tends for. In other words, decided that the act of 1858 gave no rights which the State did not already have and which it was entitled to possess upon the expiration of the charter of the canal company. There is, as we have said, strength in the contention, but, of course, the fact that the Supreme Court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company and a legislative provision against the obligation of the contract, and was an essential although unmentioned, element of the decision under review, it is a basis for the Federal question set up."

In *Terre Haute and Indianapolis Railraod Co.* v. *Indiana*, 194 U. S. 579, at page 589, it is said:

"The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

In *Louisiana Railway & Navigation Company* v. *New Orleans*, 235 U. S. 164, it is said at page 170:

"We are of the opinion that the present case is not within this rule. It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee."

After the citation of cases the court continues:

"And in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court."

In addition to the contract itself we again call attention to Sections 1061 and 1062 of the Revised Laws of 1910, which were in force at the time this bond was executed. These sections are as follows:

"Sec. 1061: Surety's right against principal and co-sureties. A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his co-sureties to contribute thereto,

without regard to the order of time in which they became such.

"Sec. 1062: Same. A surety is entitled to the benefit of every security for the performance of the principal obligation, held by the creditor or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

We believe that Sections 323 and 7943 of the Compiled Laws of 1909 and these sections just quoted from the Revised Laws of 1910 comprise all of the statutory law which was in effect and applicable to this bond at the time it was executed. What we have heretofore said with reference to the meaning of Sections 323 and 7943 need not be repeated. We think they are not susceptible of the construction given them by the Supreme Court of the State. This opinion is strengthened by Sections 1061 and 1062 of the Revised Laws of 1910, which, of course, enter into the contract. By these sections the surety is entitled to enforce the remedies which the obligee has against the principal debtor, and that indicates clearly that the taking of security does not relinquish any of the rights of the assured.

The contract itself has been quoted in full. Amongst other things it provides that the surety shall only be liable for the loss. It does not provide that the surety shall be liable to the exclusion

of the principal debtor or to the protection of the principal debtor. It likewise provides that in the event of default, the security shall be liable for its proportion of the loss, based on the liability of other sureties and securities. As this surety and the guaranty fund both secure this debt, under the contract we would have the right to apportion the loss. In other words, this section of the Code recognizes the doctrine of contribution. The bond also provides that before the surety is called upon to pay, the Obligee must assign to the surety its claim against the principal debtor, thereby clearly recognizing the existence of a claim against the principal debtor after insolvency.

The conclusion reached by the Court, it seems to us, therefore, must necessarily be based upon the 1913 statute, and the decisions we have cited show that it is not necessary for the Court to mention the subsequent statute in order for this Court to hold that the contract was impaired by that statute.

It will doubtless be argued, however, that the decision of the Supreme Court of Oklahoma in *Columbia Bank & Trust Company* v. *U. S. Fidelity & Guaranty Company*, 33 Okla. 535, was prior to the passage of the act of 1913, and that consequently

this act cannot have influenced the decision in the case at bar. If this argument is made, our reply to it is twofold. First, that it does not in any way affect the first proposition which we have discussed, namely, that the effect of the decision is to deprive us of our property without due process of law. Our second reply is that that case did not hold that the deposit here involved could not participate in the assets of the bank. Under our statutes, a syllabus is required. Section 6250 of the Revised Laws of 1910 provides:

> "A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the justice delivering the opinion of the court, and filed with the papers in the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the justices concurring therein, for revisal before filing thereof, and it shall be filed with the papers, without alteration, unless by consent of the justices concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by Section 5258."

Bearing this in mind the exact point decided in that case is stated at the end of the third syllabus as follows:

> " * * * the protection extended to general depositors by virtue of the police power of the state, by Section 323, Comp. Laws 1909,

which provides for the depositors' guaranty fund, does not apply to deposits of the permanent school fund."

At the very end of the opinion the ruling of the Court is further stated as follows:

> "The purpose of this proceeding is to compel the Bank Commissioner, acting for the principal, to pay the debt *out of the depositors' fund.* If this is done, the surety would be discharged and released from liability."

The contention of the Surety Company in that case was that the deposit secured by its bond should be paid in full out of the guaranty fund, thereby discharging it from all liability. At page 545, speaking of this contention, the Court say:

> "From our viewpoint, to concur with the latter contention would be tantamount to holding that the Legislature required the state banks in which any of the permanent school fund may be deposited to procure and pay for surety company bonds upon which the surety will never become liable. We are not willing to attribute such folly to the legislative department, when, without violating the canons of construction, it is not necessary to do so."

These quotations show that the decision did not relate to the assets of the bank, while the question here involved does relate to the assets of the bank and the act of March 6, 1913, for the first time excludes secured deposits from participation.

It will be remembered that the decision of the trial court in this case was on October 3, 1913, while this act was passed on March 6, 1913, so that necessarily this act must have influenced the decision of the court.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.

APPENDIX

Section 320. "There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this State for the purpose of creating a depositor's guaranty fund equal to five (5) per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessments shall be payable one-fifth during the first year and one-twentieth during each year thereafter until the total amount of said five (5) per centum assessment shall have been fully paid: *Provided, however,* that the assessments heretofore levied and paid by banking corporations or trust companies now existing shall be deducted from and credited as a payment on said five (5) per centum assessment hereby levied. The average daily deposits of each bank during the preceding year prior to the passage and approval of this Act shall be taken as the basis for computing the amount of the first payment on the levy hereby made. One year after the passage and approval of this Act, and annually thereafter, each bank and trust company doing business under the laws of this State shall report to the Bank Commissioner the amount of its average daily deposits for the preceding year, and if such deposits are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank or trust company having such increased deposits shall immediately pay into the depositors' guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as shown by such increased deposits. After the five (5) per cent assessment here-

by levied shall have been fully paid up, no additional assessments shall be levied or collected against the capital stock of any such bank or trust company, except emergency assessments hereinafter provided, to pay the depositors of failed banks, and except assessments as may be necessary by reason of increased deposits to maintain such fund at five (5) per centum of the aggregate of all deposits in such banks and trust companies doing business under the laws of this State. Whenever the depositors' guaranty fund shall become impaired or be reduced below said five (5) per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power, and it shall be their duty, to levy emergency assessments against the capital stock of each bank and trust company doing business in this State sufficient to restore said impairment or reduction below five (5) per cent; but the aggregate of such emergency assessments shall not in any one calendar year exceed two (2) per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor having any such unpaid deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six (6) per cent interest. Such certificates shall be consecutively numbered and shall be payable upon the call of the State Banking Board in like manner as State warrants are paid by the State Treasurer in the order of their issue out of the emergency levy hereafter made; and the State Banking Board shall from year to year levy emergency assessments as hereinbefore provided against the capital stock of all banking corporations and trust companies doing business in this State until all such certificates of indebted-

ness with the accrued interest thereon shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the same shall be applied first after the payment of the expense of liquidation to the repayment to the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board towards refunding any emergency assessment levied by reason of the failure of such liquidated bank. *Provided, further,* that seventy-five per cent of the depositors' guaranty fund shall be invested for the benefit of said fund in State warrants or such other securities as State funds are now required to be invested."

Sec. 321. "Banks and trust companies organized subsequent to the enactment of this Act shall pay into the depositors' guaranty fund three per cent of the amount of their capital stock when they open for business, which amount shall constitute a credit fund subject to adjustment on the basis of its deposits as provided for other banks and trust companies now existing at the end of one year; *provided, however,* said three per cent payment shall not be required of new banks and trust companies formed by the reorganization or consolidation of banks and trust companies that have previously complied with the terms of this Act."

Sec. 322. "Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the Bank Commissioner, or, whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to

be forfeited, or whenever the Bank Commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

"Section 323. In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section two (320), the amount necessary to make up the deficiency, and the State shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company and all liabilities against the stockholders, officers and directors of said bank or trust company, and against all other persons, corporations, or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

"Section 324. The Bank Commissioner shall take possession of the books, records and assets of every description of such bank or trust company, collect debts, dues and claims belonging to it, and upon order of the district court, or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank or trust company upon such terms as the court or judge thereof may direct, and may, if necessary, pay the debts of such bank or trust company, and enforce the liabilities of the

stockholders, officers and directors; *provided, however*, that bad or doubtful debts as used in this section shall not include the liability of stockholders, officers and directors."

No. 304.

In the Supreme Court of the United States

OCTOBER TERM, 1918.

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiff in Error,*

v.

STATE OF OKLAHOMA *et al., Defendants in Error.*

STATEMENT AND BRIEF OF DEFENDANTS IN ERROR.

S. P. FREELING,
Attorney General of the State of Oklahoma; and

W. A. LEDBETTER,
H. L. STUART,
Attorneys for Defendants in Error.

LEDBETTER, STUART & BELL,
Of Counsel.

HARLOW—OKLA. CITY.

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This Court is without jurisdiction to hear this case on writ of error. It should have been brought here, if at all, by certiorari.

Northern Pacific Ry. Co. v. *Solum*, 247 U. S. 477, 62 Law ed. 1221;

Stadleman v. *Miner*, 246 U. S. 544, 62 Law ed. 875;

Ireland v. *Woods*, 246 U. S. 323, 62 Lad ed. 745;

Philadelphia & Reading Coal and Iron Company v. *Gilbert*, 245 U. S. 164, 62 Law ed. 221;

Bethel v. *Demaret*, 10 Wall, 537, 540, 19 L. ed. 1007, 1008;

French v. *Taylor*, 199 U. S. 274, 277, 50 L. ed. 189, 191, 26 Sup. Ct. Rep. 76 ..... 3, 4

The deposit of school funds made pursuant to section 7943, Compiled Laws of 1909, was a special statutory deposit surrounded by definite limitations and was secured only by the bond sued on in this case, and was not a general deposit subject to check, protected by the depositors' guaranty fund, and the decision of the Supreme Court of Oklahoma in so construing that section is not "perverse" and "absurd."

Columbia Bank and Trust Co. v. *U. S. Fidelity and Guaranty Co.*, 33 Okla. 535, 126 Pac. 556;

Lovett v. *Lankford*, 47 Okla. 767, 145 Pac. 767 ..... 8, 9

The depositors' guaranty fund of the state of Oklahoma is created by levy of assessments on

state banks and by enforcement of first lien of the state on assets of insolvent banks. This fund is a public fund of the state devoted entirely to the payment of ordinary deposits in state banks subject to check. When a state bank becomes insolvent and the bank commissioner in paying the deposits of the bank uses a part of the depositors' guaranty fund, the statutes create a first lien on the assets of the bank until the depositors' guaranty fund is reimbursed. Creditors of the bank, including special statutory depositors are postponed until the depositors' guaranty fund is reimbursed by enforcing state's first lien on the assets of the insolvent bank.

The decision of the Supreme Court of Oklahoma in construing the statutes to the above effect is not "perverse" and "absurd."

Sections 320, 321, 322 and 323, Compiled Laws of Oklahoma, 1909;

State v. *Cockrell*, 27 Okla. 630, 112 Pac. 1000;

Lankford v. *Platte Iron Works*, 235 U. S. 461, 49 Law ed. 316;

Lankford v. *Schroeder*, 47 Okla. 1049, 147 Pac. 1049;

Columbia Bank & Trust Company v. *U. S. Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556;

Lankford v. *Engraving & Printing Co.*, 35 Okla. 404, 130 Pac. 278;

Capital State Bank v. *Western Casualty and Guaranty Co.*, 49 Okla. 549, 149 Pac. 149 11-12-13-14-15-16

The decision of the Court below was not based on Act of March 6, 1913, but on the prior statutes in force at the time the bond sued on was executed. (See above authorities) 18-19-20-21

The Fourteenth Amendment to the Constitution is not violated by the construction of the

statutes by the Supreme Court of the State of Oklahoma and the construction given the statutes is reasonable.

Noble State Bank v. *Haskell,* 219 U. S. 104, and 575;
Assaria State Bank v. *Dolley,* 219 U. S. 121;
Abilene National Bank v. *Dolley,* 222 U. S. 1;
German Alliance Ins. Co. v. *Lewis,* 233 U. S. 417;
A., A. & S. F. Ry. Co. v. *Matthews,* 174 U. S. 106;
St. Louis, Iron Mt. & Southern Ry. Co. v. *Paul,* 173 U. S. 404;
Nichol v. *Ames,* 173 U. S. 521;
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STATEMENT AND BRIEF OF DEFENDANTS IN ERROR.

(Figures in parentheses refer to pages of printed transcript of record.)

STATEMENT.

In its statement plaintiff in error omits:

First: Fact, that after demurrers to affirmative defenses of plaintiff in error were sustained in trial court on September 18, 1913, (19-20), a trial on merits was had on October 3, 1913, upon which evidence was introduced, and judgment rendered for defendants in error. (21-22).

Second: Facts of deposit of $50,000.00 prior to September 29, 1909, of permanent school fund of State of Oklahoma by Commissioners of Land Office of State of Oklahoma in Columbia Bank and Trust Company in accordance with provisions of bond sued on, of insolvency of said Columbia Bank and Trust Company on September 29, 1909, and its being taken in possession and control by Banking Commissioner of State of Oklahoma by virtue of banking laws of said State on September 29, 1909, of said Columbia Bank and Trust Company never having resumed business and having been insolvent at all times since September 29, 1909, of insufficiency of assets of said Columbia Bank and Trust Company to pay claims of general and unsecured depositors aggregating approximately $3,000,000.00, of assets of Columbia Bank and Trust Company amounting in full to approximately $2,400,00.00, of approximately $600,000.00 having to be obtained by Bank Commissioner of the State of Oklahoma from depositors' guaranty fund of State of Oklahoma, and being used by said Bank Commissioner in paying off claims of and general and unsecured depositors, which general and unsecured depositors were those depositors who had no other security for the repayment of their deposits, except the depositors' guaranty fund. (33.)

Third: Date of rendition of judgment by Supreme Court of Oklahoma herein, to-wit, October 9, 1917.

Fourth: Judgment against plaintiff in error bears only three per cent per annum interest.

Before answering contentions in brief of plaintiff in error, we respectfully call the court's attention to the question whether or not this case has been properly brought to this court.

Since judgment of Supreme Court of State of Oklahoma herein appealed from was rendered on October 9th, 1917, and basis of complaint of plaintiff in error is alleged manifest and unreasonable construction of statutes and such alleged unreasonable construction is claimed to deprive plaintiff in error of rights guaranteed to it under the Federal Constitution, and since the validity of such statutes is not questioned by plaintiff in error, this case should have been brought here by certiorari and not by writ of error.

Northern Pacific Ry. Co. v. *Solum*, 247 U. S. 477, 62 Law ed. 1221.

Stadleman v. *Miner*, 246 U. S. 544, 62 Law ed. 875.

Ireland v. *Woods*, 246 U. S. 323, 62 Law ed. 745.

Philadelphia & Reading Coal and Iron Company v. *Gilbert*, 245 U. S. 164, 62 Law ed. 221.

In the Philadelphia & Reading Coal & Iron Company case, *supra*, in which claim was made that the attempt to compel the company to respond to a suit in the state court of New York was an invasion of the company's rights under the constitution of the United States, particularly Section 1 of the Fourteenth Amendment of the Constitution at pages 165 and 166 of the 245 U. S., this court says:

"All that was drawn in question by the motion was the validity of the service and the power

> of the court, consistently with the first section of the Fourteenth amendment—probably meaning the due process of law clause—to proceed upon that service to a hearing and determination of the case. It did not question the validity of any treaty or statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the court to proceed to a decision of the merits did not draw in question an authority exercised under the state, for, as this court has said, the power to hear and determine cases is not the kind of authority to which the statute refers. *Bethell* v. *Demaret*, 10 Wall. 537, 540, 19 L. ed. 1007, 1008; *French* v. *Taylor*, 199 U. S. 274, 277, 50 L. ed. 189, 191, 26 Sup. Ct. Rep. 76."

The reading of the brief of plaintiff in error clearly shows that it relies, not upon invalidity of Sections 323 and 7943 of the Compiled Laws of 1909, but upon the alleged wrongful determination by the state court of the meaning and application of said two sections.

As the Act of March 6, 1913, (Sec. 9 of Chap. 22 of Session Laws, 1913, pages 31-32) was not considered but was expressly excluded from consideration by the Supreme Court of Oklahoma, its validity is in no way in question in this case.

Should we be mistaken, however, as to our contention that this court is without jurisdiction, we answer points raised in plaintiff in error's brief as follows:

BRIEF AND ARGUMENT

The brief of plaintiff in error and every argument therein contained are based upon a misconception of the nature of the deposit secured, and the obligations assumed in the bond sued on.

The defense of the surety company in this case is based on the theory that the bond sued on was given to secure "an ordinary deposit subject to check," and that the ordinary rules which apply to principal and surety govern this case. Basing the argument upon that premise, counsel say that the Supreme Court of Oklahoma rendered a "perverse" and "absurd" decision in holding that the principal in the bond is discharged and the surety is primarily and exclusively held to pay the penalty. This argument has been made by counsel for this surety company ever since this litigation began in the fall of 1909, and while the Supreme Court of Oklahoma has rejected the argument a number of times and pointed out the fact that the deposit was not an ordinary deposit, but a special statutory deposit surrounded by definite limitations, counsel still persist in declaring that the deposit is an "ordinary deposit subject to check," and still persist in the argument that the ordinary rules which measure the rights and liabilities of principal and surety should be applied; and because the Supreme Court of Oklahoma in construing the statute relating to the subject has repeatedly disagreed with counsel, they now say that the decisions of that court are so "perverse" and "absurd" that this court should disregard them.

A brief reference to the Constitution of Oklahoma and the statute which was the sole authority for deposit in question, and the decisions of the Supreme Court construing that statute will show how greatly counsel for plaintiff in error have misconceived the issues involved.

Section 32 of Article 6 of the Constitution of Oklahoma provides that the Commissioners of the Land Office shall have charge of the sale and disposition of the school lands and other public lands of the state and the funds and proceeds derived therefrom under rules and regulations prescribed by the legislature.

The first legislature, after the Constitution went into effect, passed an act providing in substance that all the permanent school funds shall be invested in first mortgages upon real estate and certain other securities therein mentioned, and that until such funds should be advantageously invested in the securities mentioned, the Commissioners of the Land Office should have authority to deposit the funds in banks or trust companies to be selected by them, and in order to safeguard the deposits of this fund, Section 7943 of the Compiled Laws of Oklahoma, 1909, which reads as follows, was enacted:

> "Until such time as said funds may be safely and advantageously invested in the securities mentioned in the preceding section, said Commissioners of the Land Office shall be and they are hereby authorized and empowered to deposit said sums in such banks or trust companies as they may select, but shall in every case

take as security for such deposits the following classes of securities *and no others*: Bonds of the State of Oklahoma, bonds of the counties, school districts, cities and towns of this state, state and county warrants and approved state, county and municipal bonds of other states, bonds of the United States, first mortgages on real estate, warrants or other legal evidence of indebtedness authorized by law to be issued by municipalities in payment of paving, sewer, waterworks, electric light or other public indebtedness and for which a special tax is authorized to be levied and collected for the payment thereof, and surety company bonds, and as additional security on any deposit which said board may make, the said Commissioners of the Land Office shall have authority to accept surety companies or trust companies as sureties, but in each case said Board of Land Commissioners shall accurately investigate the value of securities offered for such deposits, *provided*, however, such surety company or trust company shall neither be in any manner interested directly or indirectly in any bank or trust company for which it becomes additional surety; nor shall any surety, bonding or trust company be accepted as additional surety that has more than one-fourth of its paid capital invested in bank stock. The said Board of Land Commissioners may whenever they deem it advisable require additional securities after a deposit is made as they deem necessary to secure the safety of the deposit."

Attention is called to the fact that this section of the statute describes the securities by which the deposits of the school fund should be secured, and in

terms excludes all other securities. That statute was enacted solely with reference to the deposit of school funds and had no reference whatever to the banking laws of the state or to the depositors' guaranty fund, or assets of insolvent banks. The deposits of this school fund thus authorized to be made were not to be dealt with as "ordinary deposits subject to check," but could only be made in the banks selected by the Commissioners of the Land Office on the securities mentioned, *and no others.*

It will hardly be contended that Section 7943 is not a valid exercise of the legislative power of the state, or that the legislature was without authority to impose restrictions on the Commissioners of the Land Office mentioned in that section in making deposits of this fund. The subject was expressly committed to the legislature by the Constitution, and the surety company and all other corporations or persons dealing with the fund must be held to have known that the statute which designated the securities on which this fund could be deposited was a valid law of the state and that the exclusion of all other securities as a means of protecting this deposit was also a valid law of the state. In fact counsel for plaintiff in error do not claim that this section in unconstitutional.

The nature of this particular deposit secured by the very bond in controversy was determined by the Supreme Court of Oklahoma in the case of *Columbia Bank and Trust Company* v. *United States Fidelity*

and Guaranty Company, 33 Okla. 535, 126 Pac. 566. Speaking of this deposit the Supreme Court said:

> "That the money deposited in the bank by the Commissioners of the Land Office was a deposit in a broad sense is probably true; but it is clear to our minds that the Commissioners of the Land Office are not such depositors, and the funds which the law permits them to deposit in pursuance to their official duties are not such deposits as fall within the purview of Section 323, *supra*. This was a special statutory deposit, with strict legislative bounds within which the depositor is required to act. * * * It is apparent that Section 7934, *supra*, imposes many limitations upon deposit of public school funds not applicable to the ordinary deposits."

In *Lovett* v. *Lankford*, 47 Okla. 767, 145 Pac. 767, this view of the deposit in controversy was reaffirmed, where the court said:

> "This court, in the Columbia Bank & Trust Company case, *supra*, in effect, held that the deposits of the state were not general deposits, covered and protected by the depositors' guaranty fund. So we hold in this case."

It seems to us that Section 7943 when considered to itself, and with reference to the purpose for which it was enacted, and with reference to Section 32 of Article 6 of the Constitution which expressly committed the subject of that statute to the legislature, must be held to be a perfectly salutary and reasonable law of the state, and that the Supreme Court of the state in the two cases above mentioned, *Columbia Bank and Trust Company* v. *United States Fidelity and Guaranty Company*, *supra*, and

Lovett v. *Lankford, supra,* construed that section of the statute in a perfectly sane and reasonable way in holding that the deposits of the school fund made under the provisions of that statute was a special statutory deposit, on which were imposed many limitations not applicable to ordinary deposits, and that the deposits so made were not general deposits.

With our limited vision, we can see no other interpretation that could have been given to the statute and no other designation or description that could have been given to the nature of the deposit. The surety company when it guaranteed the payment of this deposit knew that it was a special statutory deposit, authorized only by the particular statute under discussion, and also knew that the deposit was secured by "no other" securities, except this bond.

We therefore insist that the court below in holding this deposit to be a special statutory deposit, and not an "ordinary deposit subject to check," is not subject to the criticism that its decision is "perverse" and "absurd."

The Supreme Court of Oklahoma is likewise not subjected to the criticism that its decision is "perverse" and "absurd" in holding that this deposit is not protected by the depositors' guaranty fund or the assets of the insolvent bank, the Columbia Bank and Trust Company. And the same rebuke is administered to the court below because it held that the effect of Section 323 of the Oklahoma Compiled Laws of 1909 was to give to the state, for the benefit of the depositors' guaranty fund a first lien upon

the assets of the bank, until the depositors' guaranty fund was reimbursed for all sums of money advanced from that fund to pay the bank depositors. Counsel for plaintiff in error seem to have abstracted this section of the statute from the place where it belongs, as a part of the banking system of the state and have endeavored to demolish it as a part of that system.

Sections 320 and 321 of the banking laws of Oklahoma create a depositors' guaranty fund for the purpose of guaranteeing the general deposits in state banks. Section 322 describes the conditions under which the Bank Commissioner may take possession of insolvent state banks and wind up their affairs. Section 323 provides in substance that when the Bank Commissioner takes possession of an insolvent bank for the purpose of liquidating it, the depositors of the bank should be paid in full and that when the cash available or which may be made immediately available out of the assets of the bank, is insufficient to pay its depositors in full, the banking board shall draw from the depositors' guaranty fund the amount necessary to make up the deficiency in order to pay the deposits in full, and the last paragraph of Section 323 provides for the reimbursement of the depositors' guaranty fund for any amount of that fund used to pay the deposits, as follows:

> "And the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers

> or directors of said bank or trust company and against all other persons, corporations or funds. Such liability may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 324 of the statute gives the Bank Commissioner additional authority in the administration of the affairs of the bank to the end that all of the assets of the bank on which the state has a first lien, may be applied to the payment of the deposits and the reimbursement of the depositors' guaranty fund.

All of these sections of the statute under the authorities hereafter cited have been held to be constitutional and appropriate to the purpose for which they were enacted, and among the provisions of the statutes which have been held to be valid and binding is the provision which gives the state a first lien on all of the assets of the bank to reimburse the depositors' guaranty fund. The fifth paragraph of the answer of the surety company which is set forth on page 16 of the transcript shows that the deposits in the Columbia Bank and Trust Company at the time the Bank Commissioner took possession aggregated the sum of $3,000,000.00, that its assets aggregated the sum of $2,400,000.00, and that the Bank Commissioner and Banking Board in order to complete the payment of the depositors in the bank, used $600,000.00 of the depositors' guaranty fund.

The court below held that under the provisions of Section 323, the state had the first lien on the assets of the bank until the depositors' guaranty fund was reimbursed to the extent of $600,000.00 of that fund

used to pay the deposits and that no part of the assets of the bank could be applied to the payment of the special statutory deposit secured by the bond of the surety company until the first lien of the state was satisfied. Counsel no longer question the validity of this statute; but they say the decision of the Supreme Court in giving effect to the statute as a first lien on the assets of a bank is so "perverse" and "absurd" that this court should disregard it and adopt a rule of its own.

Section 323 occupies an important place in the banking laws of the state. It is one of the means provided to maintain the depositors' guaranty fund. The depositors' guaranty fund was not an asset of the bank. It was one of the public funds of the state created under the taxing power. The assessments levied against state banks are a species of taxation. That fund is created by assessments against all the state banks as well as by enforcing the first lien created by Section 323 on the assets of insolvent banks in process of liquidation.

In *State* v. *Cockrell*, 27 Okla. 630, 112 Pac. 1000, the Oklahoma Supreme Court held:

> "That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund is also true."

It was also held in that case that the depositors' guaranty fund was created and maintained under the taxing power of the state.

Referring to *Cockrell* v. *State*, *supra*, this court in *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 49 Law ed., 316, said:

> "In *State ex rel Taylor* v. *Cockrell*, 27 Okla. 630, 112 Pac. 1000, the Supreme Court of Oklahoma had occasion to define the duties of State Examiner and Inspector. It decided that the office was constituted by the Constitution of the state and was independent of the control of the Governor, and passing upon the authority of the Examiner and Inspector over the accounts of the Bank Commissioner, it decided that "the funds and assets" of an insolvent bank are "under the management of the state," and "that the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund."
>
> "It was further decided that the act creating the fund was sustained as an exercise of the police power for the public welfare of the people of the state, and, having been so exercised, the assessment levied by it upon deposits for the purpose of protecting the depositors of the banks is the exertion of the same power 'which levies or causes to be levied, a tax upon the property within the state for the maintenance and support of the common schools and educational institutions.' And it was said: 'The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even

> if it were not a state fund, it would at least be a fund under the management of the state.'
>
> "From the decision it appears that the law intended to give to the state, as definite a title to the depositors' guaranty fund as to the common school fund; as definite, therefore, as the title of Sourth Carolina to the assets of the state dispensary, which was the subject of decision in *Murray* v. *Wilson Distilling Company*. In both cases there were ultimate beneficiaries —in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control."

The portion of the depositors' guaranty fund produced by enforcing the first lien of the state upon the assets of failed bank is just as much a part of the public funds of the state as the other portion of the depositors' fund realized from assessments against banks. The lien attaches as soon as any part of the depositors' guaranty fund is used to pay the deposits, and being a first lien, it has priority over all other claims until that fund is fully reimbursed. To the extent that the depositors' guaranty fund is a public fund whether created by the levy of assessments against state banks or the enforcement of the first lien of the state against the assets of failed bank, no person other than an ordinary depositor who has placed his money in bank in due course has any interest in that fund.

Lankford v. Schroeder, 47 Okla. 1049, 147 Pac. 1049.

The construction given to Section 323 by the court below is clearly the only construction that could be given consistent with its language and purpose. There is nothing ambiguous about the language. It plainly creates a first lien on the assets of failed banks to reimburse the depositors' guaranty fund. The statute was in force when the bond was given and every provision and obligation of the bond were subject to all the provisions of the banking laws, including the provision that created a first lien on the assets of the Columbia Bank & Trust Company to reimburse the depositors' guaranty fund to the extent of $600,000.00 of that fund used to pay the deposits. This is true to the same extent as though the provisions of section 323 were incorporated in the bond in *haec verba*, and if the provisions of that section were written into the bond the effect would be to declare that no part of the assets of the Columbia Bank and Trust Company should be used to pay the penalty in the bond until the depositors' guaranty fund should be reimbursed for any amount of that fund which might be used to pay the Columbia Bank and Trust Company's depositors.

Section 323 was in force when the bond was executed and it was executed subject to all the rights of the state in the depositors' guaranty fund.

When section 323 is considered in its relation to the cognate provisions of the statutes of Okla-

homa creating the banking system of the state, it is difficult to see how any interpretation could have been given by the court below except to hold that the deposit in question, being a special statutory deposit surrounded by definite limitations, could not be paid out of the assets of the bank until the first lien of the state was satisfied. Having shown that the two statutes so bitterly assailed by counsel for plaintiff in error, when construed in connection with the manifest intentions and purposes of the legislature in enacting them, mean exactly what the Supreme Court of Oklahoma has interpreted them to mean, and that when that meaning is given effect, these statutes accomplish legitimate and salutary purposes in the affairs of the state, and we submit that the entire argument of counsel based on their attack on these statutes falls to the ground.

The decision of the court below in construing these statutes is not "perverse" and is not "absurd," but on the contrary the decision is consistent and logical.

II.

The decision in the court below was rendered wholly without reference to the Act of March 6, 1913, which provides that no deposit in State Banks otherwise secured shall be paid out of the Depositors' Guaranty Fund, and the persistent statement by counsel in their brief that the decision in the court below is based on that statute is not justified by the facts.

In this connection we take the liberty to quote from the brief in the Supreme Court of Oklahoma prepared by the same counsel as appear in this case. After quoting section 9 of the Session Laws of 1913, which prevents the payment of secured deposits out of the depositors' guaranty fund, counsel said:

> "By this is provided that the deposit is not protected by the guaranty fund, but it is not provided that the deposit is not protected by the assets of the bank, and in the event this statute cannot effect the obligation of the contract in this case * * * if these rights are taken from them by virtue of the act of 1913, it is manifest that the obligation of the contract has been impaired and that this is a violation of the Federal Constitution."

In response to this suggestion from counsel, the court below said:

> "The rights of the parties to this litigation are not affected by subsequent changes in the law regulating the depositors' guaranty fund, but must be determined by the law as it existed when the deposit was made and when the Columbia Bank and Trust Company passed into the hands of the Bank Commissioner." (29-30.)

The Supreme Court of Oklahoma evidently thought it was paying no attention to the act of the legislature of March 6, 1913, passed four years after the bond involved in this case was executed, but thought it was deciding the case under the laws

existing when the contract was made. Notwithstanding this plain declaration by the Supreme Court that subsequent laws had nothing to do with the case, counsel in their brief persist in the insinuation that the subsequent statute controls the decision of the court.

In the fifth assignment of error counsel state:

> "The Supreme Court of the State of Oklahoma erred in holding that sections 323 and 7943 of the Compiled Laws of 1909, construed in connection with section 9 of chapter 22 of the Session Laws of 1913, did not violate the Fourteenth Amendment of the Constitution of the United States, and section 10 of article 1 by taking the property of plaintiff in error without due process of law."

On page 39 of their brief, counsel say;

> "While the opinion of the Supreme Court does not mention the act of 1913, it gives effect to that act as applied to existing contracts."

And again on page 29 of their brief, counsel say:

> "The conclusion reached by the court, it seems to us, therefore, must necessarily be based upon the statute of 1913."

And again on page 51, counsel say:

> "It would be remembered that the decision of the trial court in this case was on October 3, 1913, while this act was passed on March 6, 1913, so that necessarily this act must have influenced the decision of the court."

That the State Supreme Court did not base its decision on the statute of 1913, but on its interpretation of sections 323 and 7943 of the Compiled Laws of 1909 is shown by the following quotation from the opinion which is sought to be reversed herein:

> "Counsel insist that previous decisions of this court have declared the law to be that deposits of the character herein involved are not entitled to payment from the depositors' guaranty fund, but that this court has not yet decided the question as to whether such deposits were entitled to share in the distribution of the assets of an insolvent bank or trust company. Section 323, Comp. Laws of 1909, makes it the duty of the bank commissioner in the event he shall take charge of a bank or trust company, to pay the depositors of the bank or trust company in full, and provides that when the cash available, or that which can be made immediately available, of said bank or trust company, is insufficient to discharge its obligations to depositors, the banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, an amount necessary to make up the deficiency, and gives the state a first lien upon the assets of said institution and all other liabilities, against the stockholders, officers and directors and against all persons, corporations or firms, which may be enforced by the state for the benefit of the depositors' guaranty fund. Construing the statute in a number of cases, the rule has been announced that moneys deposited in an institution by the commissioners of the land office under the provisions of section 7943, Comp.

> Laws of 1909, were not such deposits as fell within the purview of this section of the statute. Counsel concede that such has been the uinform holding of the court, but contend that such holding is wrong, and should be reversed. The question has been examined, and the rule announced so often, that it may well be considered as the settled views of this court upon that proposition. *Columbia Bank & Trust Co.* v. *U. S. Fidelity & Guaranty Co.*, 33 Okla. 535, 126 Pac. 556; *Lankford* v. *Okla. Eng. & Ptg. Co.*, 35 Okla. 404, 130 Pac. 278; *Lovett* v. *Lankford*, 47 Okla. 767, 145 Pac. 767; *Lankford* v. *Schroeder*, 47 Okla. 1049, 147 Pac. 1049, L. R. A. 1915F, 623; *Capitol State Bank* v. *Western Casualty & Guaranty Co.*, 47 Okla. 549, 149 Pac. 149." (25.)

Subsequent portions of the opinion only serve to emphasize the fact that the opinion sought to be reversed was based on the interpretation which the court had previously placed on sections 323 and 7943, Compiled Laws of 1909; and in that regard the court said that in the former decision in *Columbia Bank & Trust Company* v. *U. S. Fidelity & Guaranty Company*, 33 Okla. 535, 126 Pac. 556, one of the questions presented for consideration was whether the deposits of the Commissioners of the Land Office was entitled to participate pro rata in the distribution of the assets of the bank, that in discussing this question the contention of the surety company was said to be that the deposit of the Commissioners of the Land Office ought to be treated as all other deposits, that the Commissioners of the Land Office ought to participate pro rata in the dis-

tribution of the assets of the bank, that after the assets were exhausted, if there be a deficit, it ought to be paid out of the guaranty fund and that until the guaranty fund was exhausted the surety should not be called upon to meet the obligation of its bond.

It is pointed out that the court in the former case declined to adopt this view, and in considering section 323, *supra*, and section 7943, Compiled Laws of 1909, held that section 323 was enacted in pursuance of the police power of the state, acting in its sovereign capacity in behalf of its people and their interest, and not in its own behalf, and that by virtue of said section it was not intended to protect such deposits as here involved by the guaranty fund, and that section 7943 specifically related to the funds of the state itself, and the broad subject embraced within its purview was the temporary deposit and protection of the permanent school fund until it could be invested in the securities prescribed by law.

It is also pointed out that this former decision determined adversely to the contention of the present plaintiff in error the question as to whether the Commissioners of the Land Office were entitled to participate in the distribution of the assets of the bank, and on this point the court said

> "The primary purpose of the bank guaranty law being to guarantee the payment of general deposits, excluding deposits of the character in question, the state is given a first lien upon the assets of the bank for the protection of the guaranty fund, and the bank commis-

sioner is specifically charged with the duty of applying the cash on hand and assets which can be converted into cash to the payment of deposits intended to be secured. It would be reasoning in a circle to say that the deposit of plaintiffs was not enttiled to be paid out of the guaranty fund and yet would be entitled to participate in the assets of the insolvent institution. If that be permitted the lien of the state for the benefit of the guaranty fund is subordinated to the payment of plaintiff's deposit, and thus indirectly would be accomplished that which was not the intent of the law, and the purpose of the law be defeated. In *Lankford, State Bank Comm.*, v. *Oklahoma Eng. & Ptg. Co.*, it was said:

" 'The effect of this statute is to make the state a preferred creditor until any deficiency in the guaranty fund, created by the payment therefrom of the depositors of an insolvent bank, is made up. After that, any remaining assets of the bank become available for the purpose of being pro rated and distributed among the general creditors of the bank, in the manner contended for by counsel for defendant in error." ' (26-27.)

Having thus shown conclusively that the opinion of the court below was determined under the law existing at the time the bond in question was executed and without reference to the act of March 6, 1913, the elaborate argument of counsel for plaintiff in error beginning on page 39 of their brief and ending on page 47, becomes irrelevant and immaterial. It might be said in passing, however, that the act of March 6, 1913, was passed after the

Supreme Court had held that the special statutory deposit of the Commissioners of the Land Office was not protected by the depositors' guaranty fund or by the assets of insolvent banks, and that that act extended the rule so as to exclude all other secured deposits.

Throughout this litigation the views of the opposing parties have been wide apart. It has been the contention of the Commissioners of the Land Office that the effect of the bond executed to secure their deposits in state banks operated under the depositors' guaranty law was to guarantee the solvency of the bank, and that as custodians of the school fund deposited in state banks, the Commissioners of the Land Office could not be relegated to the depositors' guaranty fund or the assets of failed banks for the reason that that fund, whether produced by assessments or enforcement of the state's first lien on assets of failed banks, constituted one of the public funds of the state devoted exclusively to the maintenance of the state's bank system. On the other hand, it has been the contention of the surety company that the resources of the depositors' guaranty fund should be exhausted before it could be called upon to pay the deposit, which in effect was to insist that it could never be called upon to pay the deposit, in view of the exhaustless resources of the depositors' guaranty fund.

One of the reasons why it could afford to press this extreme contention, after repeated decisions against it, is that the judgment of the trial court

required it to pay only three per cent per annum interest on the amount of the deposit. (21.)

III.

The Fourteenth Amendment is not violated by the construction of the Statute by the Supreme Court of Oklahoma. Such construction is reasonable.

Noble State Bank v. *Haskell*, 219 U. S. 104 and 575.
Assaria State Bank v. *Dolley*, 219 U. S. 121.
Abilene National Bank of Abilene v. *Dolley*, 228 U. S. 1.

In the Noble State Bank case, 219 U. S. at page 111, this court says:

> "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greately and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If,

then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way."

In the Assaria State Bank Case, 219 U. S. at pages 126 and 127, this court says:

"The case of *Noble State Bank* v. *Haskell*, just decided (219 U. S. 104, *ante*, 112, 31 Sup. Ct. Rep. 186) cuts the root of the plaintiffs' case, except so far as the Kansas law shows certain minor differences from that of Oklahoma. The most important of these is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the circuit judge, that the law would not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate stop."

"We shall not go through the details of minute criticism urged by the appellants, in

most if not all of which they are in no way concerned. Perhaps the most striking of these subordinate matters is the preference of ordinary depositors over other creditors, a preference that seems to be overstated by the appellants. This, obviously, is in aid of what we have assumed to be the one of the chief objects and justifications of such laws—securing the currency of checks."

In Abilene National Bank case, 228 U. S. at pages 4 and 5, this court says:

"The specific discrimination pointed out is that, under the Kansas statutes, the national banks do not share equally with depositors in the assets of an insolvent state bank. The bill alleges that the plaintiffs necessarily have and make deposits with state banks, and that banks necessarily borrow money from other banks and rediscount paper in other banks, and that the obligation of their contracts will be impaired and they will be deprived of the property without due process of law, contrary to article 1, section 19, and the Fourteenth Amendment of the Constitution. The section of the statute specified as having this effect is section 4, which contemplates the primary application of the assets of the bank and the double liability of stockholders to depositors. It is replied that the word 'depositors' obviously was used by mistake for 'creditors,' and that the statute was amended by substituting the latter word in 1911, chap 62, section 1. But, further, the language of the bill and the argument show that the complaint refers to future transactions, not to past. There is nothing sufficient to raise a question as to deal-

ings before the law went into effect. Contracts made after the law was in force, of course, are made subject to it, and impose only such obligations and create only such property as the law permits. *Denny* v. *Bennett*, 128 U. S. 489, 494, 32 L. Ed. 491, 9 Sup. Ct. Rep. 134; *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638, 639, 56 L. Ed. 924, 927, 928, 32 Sup. Ct. Rep. 577.

"The greater part of the bill is taken up with objections to the scheme of the statute, in which the plaintiffs have no concern, and that have been disposed of by the former decision of this court upon the Kansas act. There is nothing in it that calls for further remark."

The bond executed by plaintiff in error was given by plaintiff in error and accepted by the state after section 323 of the Compiled Laws of 1909 had gone into effect. It signed the bond as surety for the Columbia Bank and Trust Company voluntarily and for hire.

It could have avoided any liability by abstaining from the execution of the bond, in accordance with the doctrine announced in this court in opinion denying rehearing in the Noble State Bank case at page 580 of the 217 U. S., that the Noble State Bank could avoid the payment of an assessment for the purpose of creating a depositors' guaranty fund by going out of the banking business.

We respectfully insist that the decisions of this court above cited in effect decide the very question

here involved against contention of plaintiff in error.

In *German Alliance Insurance Company* v. *Lewis*. 233 U. S. at pages 417 and 418, in its opinion, this court says:

> "The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the state and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court; it is, however, covered by the assignments of error.
>
> "The provision of the statute is, 'that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state, and insuring only farm property.' The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may

exercise. A legislative classification may rest on narrow distinctions."

In *Atchison, Topeka & Santa Fe Railroad Company* v. *Matthews*, 174 U. S., this court held that the statute of Kansas providing that in an action against a railroad company for damages by fire caused in the operation of the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad, and the amount of his damages, and that such proof should be *prima facie* evidence of negligence on the part of the railroad company, and that plaintiff in the event of a recovery should also be allowed a reasonable attorney's fee, was not in conflict with the Fourteenth Amendment as denying the equal protection of the laws, and was sustained as valid.

In the opinion at page 106 of 174 U. S., Mr. Justice Brewer says:

> "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says in effect that if suit be brought against a railway company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an indi-

vidual for destruction of its livestock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals, yet this court has unanimously said that this differentiation of liability, this inequality of rights in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Paul*, 173 U. S. 404 to 410, this court held that the Arkansas Act of 1889 requiring railroad companies to pay their employees when discharged their unpaid wages then earned, without deduction, or that such wages should continue at the same rate until paid, not to exceed sixty days, neither denied to such companies the equal protection of the laws, nor deprived said companies of their property without due process of law.

In *Nicol* v. *Ames*, 173 U. S. at page 521, in the opinion, this court says:

"The question is, when a classification is made, whether there is any reasonable ground for it or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, C. & S. F. Railroad Company* v. *Ellis*, 165 U. S. 150-155 (41: 666-668); *Magoun* v. *Illinois Trust & Savings*

Bank, 170 U. S. 283, 294 (4: 1037-1043). If the classification be proper and legal, then there is the requisite uniformity in that respect."

Applying this principle, it was not only proper and legal, but also sound public policy for the State of Oklahoma to provide a protection for the deposit of the permanent school fund made by the Commissioners of the Land Office other than and different from that of the depositors' guaranty fund.

In *Magoun* v. *Savings Bank*, 170 U. S., page 296, in the opinion of this court, Mr. Justice McKenna, upholding the constitutionality of the inheritance tax laws of Illinois, providing for different classes and different rates of taxation, says:

> "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind, we can solve the question in controversy.
>
> "There are three main classes in the Illinois statute, the first and second being based respectively on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, there-

> fore depend on substantial differences, differerences which may distinguish them from each other and them or either of them from the other class difference, therefore, which bear a just and proper relation to the attempted classification—the rule expressed in *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis, supra.* And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'"

In *C., B. & Q. Railway Co.* v. *Chicago*, 166 U. S. 226, this court held that a railway company is not denied the equal protection of the laws by awarding it merely nominal compensation for the laying out of a street across its road, while individual property owners are given the value of their land that is taken.

In *Merchants Life Association* v. *Yoakum*, 98 Federal, 251, the Circuit Court of Appeals for the Fifth Circuit held that the provisions of article 3071 of Revised Statutes of the State of Texas 1895, reading as follows:

> "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the protection and collection of such loss;"

did not violate the Fourteenth Amendment as to the equal protection of the laws, although said article 3071 did not make the damages and attorney's fees therein provided for recoverable from fire insurance companies or companies engaged in insurance business other than life or health.

Respectfully submitted,

S. P. FREELING,
Attorney General of the State of Oklahoma; and

W. A. LEDBETTER,

H. L. STUART,
Attorneys for Defendants in Error.

LEDBETTER, STUART & BELL,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1918

United States Fidelity & Guaranty Company,
Plaintiff in Error,
vs.
State of Oklahoma et al.,
Defendants in Error.

No. 308

REPLY BRIEF OF PLAINTIFF IN ERROR

FIRST.

The defendant in error raises the question of the jurisdiction of this Court, contending that the case should be here by *certiorari* and not by writ of error. The case is properly here by writ of error because it involves the validity of legislation of the State of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract. Counsel for defendant in error concede that this question is properly reviewable on writ of error,

but say that as the Act of March 6th, 1913, was not the basis of the Court's opinion, its validity is not a question in the case. This assumes a decision adverse to the plaintiff in error and the assumption, instead of involving the question of jurisdiction, involves the decision of a question over which the Court confessedly has jurisdiction.

As the case, on the constitutional question stated, is properly here on writ of error, the Court will determine all the questions involved.

Horner v. *United States* No. 2, 143 U. S. 570.
Penn Mutual Life Insurance Company v. *Austin*, 168 U. S. 685-695.
Fields v. *Barber Asphalt Paving Company*, 194 U. S. 618-620.

SECOND.

In our brief (pages 19 to 39) we discuss the construction of the statutes involved making the argument that they were unreasonably construed by the Supreme Court. Counsel for defendants in error reply to this argument on pages 5 to 17 of their brief. In this reply they make two points: First, that the deposit involved is not an ordinary deposit subject to check, but a special statutory deposit; and, second, that consequently Section 323

gives to the State a lien for the benefit of the guaranty fund which is superior to the right of this deposit to participate either in the assets of the bank or in the guaranty fund.

It will be observed that the vital point of difference between our argument and theirs relates to the nature of the deposit. Their second proposition just stated grows out of their first. They do not contend that the State would have a lien for the benefit of the guaranty fund prior to the right of a general depositor to participate, but base their second argument upon the promise that the deposit involved is not an ordinary deposit, but is a special deposit.

Therefore, if this Court holds that the deposit involved is a general deposit and not a special deposit, the argument of the defendants in error is undermined. We are glad to have the issue thus limited and defined. The deposit involved was a deposit subject to check. That appears from the language of the bond itself. It was a deposit of money and not of some particular property to be returned in kind. This being true, it was an ordinary deposit subject to check and not a special deposit either statutory or otherwise. Neither Section 323 nor 7943 uses the term "special de-

posit." The language of both sections plainly implies deposits in the ordinary course of business. Such deposits are general deposits and not special deposits. This is made clear by the decisions of this Court in

Marine Bank v. *Fulton Bank*, 2 Wallace 252, and
Bank of the Republic v. *Millard*, 10 Wallace 152.

In the first named case, at page 256, this Court says:

> "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *The case before us is not of the former class. It must be of the latter.* The parties seem to have taken this view of it, as is shown by the reply made by the Chicago bank, May 1st and 6th, to the New York bank, when inquiring how the account stood."

In the second case, at page 155, this Court says:

"It is no longer an open question in this Court, since the decision in the cases of *The Marine Bank* v. *The Fulton Bank* and of *Thompson* v. *Riggs*, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Camphill, in the House of Lords, in the case of *Foley* v. *Hill*, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect."

And again, at page 158, this Court says:

"It is hardly necessary to say that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no

difference whether the parties to it are private persons or public agents.

"As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit."

The rule in Oklahoma is the same. In *Bank of Blackwell* v. *Dean*, 9th Okla. 626, it is held in the syllabus:

"Banks—Deposits in—Special and General. Deposits of money in a bank are either general or special. A general deposit is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor.

"Same — Presumption — Burden of Proof. Deposits of money made in a bank in the ordinary course of business are presumed to be general, and the burden of proof is on the depositor to overcome such presumption by showing that the deposit was made under such stipulations or directions as to constitute it a special deposit."

This deposit, therefore, being an ordinary de-deposit subject to check, and not a special deposit, it follows that our interpretation of the statute is

right and that the argument of the defendants in error is unsound.

The fact that this deposit was of public funds and made pursuant to statute does not alter the nature of the deposit, change the relation of debtor and creditor which exists between a bank and its customers, or make it a special deposit as distinguished from a general deposit.

Bank of the Republic v. *Millard, supra.*
McCann v. *Randall,* 147 Mass. 81.

We also call attention to the fact that the entire argument of the defendant in error on this proposition is based on the point which we have just discussed. They do not express any different views on the other positions taken in our brief.

THIRD.

Pages 17 to 25 of the brief of defendants in error are devoted to an effort to show that the Supreme Court rendered its decision without reference to the Act of March 6. 1913. and that therefore that act does not impair the obligation of the contract. Our argument on this point (pages 39 to 51 of the brief) contains an express admission that the Court did not refer to the Act of 1913. It was,

therefore, not necessary for the defendants in error to devote so much space to showing that the act was not referred to. We showed in our brief, however, that the omission of the Court to refer to the act was not conclusive that the act did not influence the decision.

On the other hand, if a proper construction of the statutes in force when the bond was executed leads to the conclusion that this deposit was a general deposit and therefore entitled to participate in the assets of the bank and the guaranty fund, it necessarily follows that the subsequent Act of March 6, 1913, altering that right must have been the basis of the Court's decision and therefore that that act impairs the obligation of the contract.

As we understand, this is the effect of the decisions of this Court cited in our original brief. The omission of the State Court to mention the statute does not alter the fact that the statute exists, and if the State Court misconstrued the previous statutes, this error cannot take from the plaintiff in error his contract right under a correct interpretation of the statutes.

To state the proposition differently, we understand the law to be this: This Court will always

determine for itself the contract rights of a party who claims that the obligation of his contract has been impaired. The contract in this case involves the interpretation of Sections 323 and 7943 of the Compiled Laws of 1909 and Sections 1061 and 1062 of the Revised Laws of 1910. These were the statutes in force when the contract was made. If this Court itself reaches the conclusion that by the contract this deposit was entitled to participate in the assets of the bank and in the guaranty fund (ratably with the guaranty company) and that this right was impaired by the Act of March 6, 1913, the failure of the State Court to mention that act and the fact that it bases its decision upon an interpretation of the other statutes, does not alter the contract itself or prevent this Court from construing the contract in order to ascertain whether its obligation has been impaired. If the contract is as we contend it is, it necessarily follows that the Act of March 6, 1913, undertakes to impair its obligation and is therefore void.

FOURTH.

The remaining argument of the defendants in error, pages 25 to 34 of their brief, it seems to us, is based upon a misconception of our position. We have not contended that statutes might not have

been framed so as to mean what the Supreme Court in this case has held. What we have contended is that the statutes as framed do not mean what that Court has held, and that consequently the contract between the parties is impaired by the subsequent act of the legislature and that the construction by the Court of the statutes is so unreasonable as to impose an unforseen obligation and therefore a deprivation of property without due process of law.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* STATE OF OKLAHOMA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 304. Argued April 17, 1919.—Decided May 19, 1919.

The court has no jurisdiction on error, under Jud. Code, § 237, as amended, on the ground that a state law was sustained against a claim that it impaired the obligation of a prior contract, where the state court appears to have rested its judgment, reasonably, on earlier laws and decisions, without any application of the law in question.

Writ of error to review 168 Pac. Rep. 234, dismissed.

THE case is stated in the opinion.

Mr. C. B. Ames for plaintiff in error.

Mr. H. L. Stuart, with whom *Mr. S. P. Freeling*, Attorney General of the State of Oklahoma, and *Mr. W. A. Ledbetter* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

May 18, 1909, plaintiff in error became surety upon a bond to secure repayment of funds to be deposited by

Commissioners of the Land Office of Oklahoma with the Columbia Bank & Trust Co. After receiving more than $50,000 the Trust Company became insolvent, and in September, 1909, refused to honor a proper demand therefor. The State sued the surety in one of its own courts, December 24, 1909, and judgment there for full amount of the bond was affirmed by the Supreme Court, October 9, 1917. 168 Pac. Rep. 234.

The cause is here on writ of error and jurisdiction of this court is challenged upon the ground that the suit is not one "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Judicial Code, § 237, as amended by Act approved September 6, 1916. We think the point well taken and the writ must be dismissed.

In support of our jurisdiction it is said: "The case is properly here by writ of error because it involves the validity of legislation of the State of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract." But we have often held that mere assertion of a claim in respect of some constitutional right is not sufficient; there must be a real and substantial controversy of the required character which deserves serious consideration. *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652, 658.

Counsel for plaintiff in error further say: "Our position is that under this bond and the statutes in force at the time it was executed a contract was created between the State, the Columbia Bank & Trust Company, and the United States Fidelity & Guaranty Company, pursuant to which the Guaranty Company was liable to the State

for such loss as it might sustain by reason of the failure of the Trust Company; that the Guaranty Company was entitled to exoneration from the Trust Company and to contribution from the guaranty fund; and that this contract was impaired by the Act of March 6, 1913." (§ 9, c. 22, Session Laws, 1913.) It provides, "No deposit in a state bank, otherwise secured, shall be protected by, or paid out of, the Depositors' Guaranty Fund created under the laws of the State of Oklahoma, nor included in the computation of average daily deposits as a basis for assessments. No deposit in any state bank, on which a greater rate of interest is allowed or paid, either directly or indirectly, than is permitted by the rules of the Bank Commissioner, shall participate in the benefits of the Guaranty Fund."

The opinion of the Supreme Court makes no reference to the Act of March 6, 1913, and we can discover no plausible basis for the argument that, notwithstanding such omission, force and effect were really given thereto—that it must have been the basis of the decision. The court approved, and undertook to support its conclusion by former opinions, commencing with *Columbia Bank & Trust Co.* v. *United States Fidelity & Guaranty Co.*, 33 Oklahoma, 535, decided in 1912, which, it declared, show a consistent view contrary to the position maintained by plaintiff in error. And an examination of these opinions leaves no doubt that they are relevant and tend to uphold the doctrine applied in the present cause. We find nothing to indicate a purpose to give effect to the specified act.

Dismissed.